No. 78-572

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1978**

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**UNITED STATES PAROLE COMMISSION, et al.,**

Petitioners,

-vs-

**JOHN M. GERAGHTY,**

Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

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# BRIEF OF RESPONDENT

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## BRIEF OF RESPONDENT

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### OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a-73a) is reported at 579 F.2d 238 (3d Cir. 1978). The opinion of the district court (Pet.App. 77a-93a) is reported at 429 F.Supp. 737 (M.D.Pa. 1977).

### JURISDICTION

The judgment of the court of appeals was entered on March 9, 1978; rehearing was denied on May 8, 1978. The petition for writ of certiorari was timely filed, by virtue

of two extensions of time, on October 5, 1978. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Is an order refusing to allow a case to be maintained as a class action subject to effective appellate review upon an appeal from the final decision of the case?

2. On the facts of this case, did the court of appeals err in reversing the district court's adverse class determination and remanding the case for further consideration of the class issue?

3. Did the court of appeals, in reversing the district court's grant of summary judgment, correctly conclude that if on remand the district court determines that the case should be maintained as a class action, the plaintiff class is entitled to a trial on the merits of their detailed factual allegations that the federal parole guidelines are unlawful or unconstitutional, either on their face or as applied?

## ADDITIONAL STATUTES AND REGULATIONS INVOLVED

In addition to the constitutonal provisions, statutes, rules, and regulations set out in Pet.Br. 3-7, this case involves:



1. 18 U.S.C. §4205(g):

At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

2. 18 U.S.C. §4208(g):

If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding,

3. 28 C.F.R. §2.12, which provides in pertinent part as follows:

**2.2 Initial hearings: Setting presumptive release dates**

(a) An initial hearing shall be conducted within 120 days of a prisoner's arrival at a federal institution, or as soon thereafter as practicable, in the following cases:

(1) A prisoner with no minimum term of imprisonment; and

(2) A prisoner with a minimum term of imprisonment and a maximum term or terms of less than seven years.

(b) In the case of prisoners with a minimum term of imprisonment and maximum term or terms of seven years or more, an initial hearing shall be conducted at least thirty days prior to the completion of the minimum term of imprisonment, or as soon thereafter as practicable.

(c) Following initial hearing: (1) The Commission shall set a presumptive release date (either by parole or by mandatory release), or set an effective date of parole, in the case of every prisoner with a maximum term or terms of less than seven years.

* * *

4. 28 C.F.R. §2.19 (as amended by 44 Fed.Reg. 26550 (May 4, 1979);

**§2.19 Information considered**

(a) In making a determination under this chapter (relating to release on parole) the Commission shall consider if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Pre-sentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney; and

(5) Reports of physical, mental, or psychiatric examination of the offender.

(b) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.



(c) The Commission may take into account any substantial information available to it in establishing the prisioner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. However, the Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt).

(d) Recommendations and information from sentencing judges, defense attorneys, prosecutors, and other interested parties are welcomed by the Commission. In evaluating a recommendation concerning parole the Commission must consider the degree to which such recommendation provides the Commission with specific facts and reasoning relevant to the statutory criteria for parole (18 U.S.C. 4206) and the application of the Commission's guidelines (including reasons for departure therefrom). Thus, to be most helpful, a recommendation must state its underlying factual basis and reasoning. However, no recommendation (including a prosecutorial recommendation pursuant to a plea agreement) may be considered as binding upon the Commission's discretionary authority to grant or deny parole.

## STATEMENT

In 1973, the federal parole board adopted[1] explicit parole release criteria -- the parole "guidelines" --for adult prisoners.[2] Because these guidelines are "loosely based" upon the board's policies in Youth Correction Act

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1 The parole guidelines were first issued on November 19, 1973. 38 Fed.Reg. 31942 (1973). Following Pickus v. United States Board of Parole, 507 F.2d 1103 (D.C. Cir. 1974), which held that promulgation of the guidelines was governed by the publication and notice standards of the Administrative Procedure Act, 5 U.S.C. §553, the guidelines were repromulgated on an emergency basis, 39 Fed.Reg. 45296 (1974), and were reissued on September 5, 1974, 40 Fed.Reg. 41328 (1975). With the effective date of the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233, 90 Stat. 219-33 (1976), the newly named United States Parole Commission repromulgated the existing guidelines on an emergency basis. 41 Fed.-Reg. 19330-31, 19341 (1976). Subsequent revisions appear at 41 Fed.Reg. 37322 (1976), 42 Fed.Reg. 12045 (1977), 42 Fed.Reg. 31786(1977), and 42 Fed.-Reg. 52399 (1977). The most recent guidelines became effective on June 4, 1979, and appear at 44 Fed.Reg. 26542-48 (May 4, 1979).

2 Explicit parole release criteria were held to be constitutionally required in Childs v. United States Board of Parole, 371 F.Supp. 1246 (D.D.C. 1973). The parole board acquiesced in that portion of the district court's decree. See 511 F.2d 1270, 1273-74 (D.C. Cir. 1974) (affirming other portions of the decree which had been challenged by the board).



cases,[3] in which there is no judicially set length of sentence,[4] the adult guidelines make the parole release decision depend primarily on whether the prisoner has served a "customary length of imprisonment" which does not consider the actual sentence imposed, the facts of the particular criminal act, in prison conduct, or any other indicia of rehabilitation. The "customary length of imprisonment" in fact exceeds the actual sentence imposed on at least 60% of all persons convicted of federal offenses,[5] and in less than seven percent of all

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3 Complaint, ¶30 (App. 11), admitted in petitioners' Return and Answer. (App. 25.)

4 A committed youth offender may be released at any time after incarceration. 18 U.S.C. §5017(a).

5 Over half of all persons convicted of federal offenses are sentenced to probation. See Administrative Office of the United States Courts, Federal Offenders in the United States District Courts 1974, 5 (1978). For those sentenced to a term of probation, the "customary length of imprisonment," of course, is zero. As to persons sentenced to imprisonment, information provided by the board in this case shows that almost 25% of persons who are eligible for parole are denied parole because their sentences are too short to allow them to serve the "customary length of imprisonment" of the guidelines. According to a spokesman for the Office of Improvements in the Administration of Justice of the Department of Justice, "approximately 50 percent of the defendants sentenced to imprisonment . . . are eligible for parole at the time

footnote continued

cases will parole be granted before a prisoner has served this "customary length of imprisonment."[6] The result is that 27% of all prisoners, who, receive "lenient" prison sentences, are routinely denied parole.[7]

The situation of John M. Geraghty, the named plaintiff, is typical of the several thousand prisoners who each year are denied parole through application of the parole guidelines.[8] Geraghty initially received a 48

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recommended in the guidelines. . . " Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedure of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess., pt. 12, at 9000 (1977). By subtraction, the result is that 25% of all prisoners have sentences of such length that they do not even become eligible for parole until after they have served their "customary length of imprisonment."

6 In fiscal year 1975, 91.3% of all prisoners were required to serve at least their "customary length of imprisonment" before being paroled. The percentage increased slightly to 93.2% in 1976 and was relatively unchanged in 1977 at 93.4%. Stone-Meierhoefer, Workload and Decision Trends Statistical Highlights 10/74-9/77, 10 (U.S. Parole Commission Research Unit Rep. 18, 1977.)

7 Information provided by the board in this case shows that 6151 initial parole hearings were held from October, 1977 to March, 1978, and that in 1635 of those hearings, parole was denied because the prisoner would completely serve his (or her) sentence before he (or she) could serve the "customary length of imprisonment" of the guidelines.

8 Approximately 10,000 prisoners are considered for parole each year. Stone-Meierhoefer, supra note 6, footnote continued



month sentence, imposed under the provisions of 18 U.S.C. §4208(a)(2) (1970).[9] (Complaint, ¶4, App. 3-4.) Although this sentence was subsequently reduced to 30 months on a timely motion under Rule 35 of the Federal Rules of Criminal Procedure, see United States v. Braasch, 542 F.2d 442 (7th Cir. 1976), Geraghty was nonetheless denied parole because his "customary length of imprisonment" was set by the parole board as 36 to 48 months. (Complaint, ¶7-¶12, App. 5-6.)

Geraghty believed that he, along with thousands of others, had been denied parole by an arbitrary and irrational system, unauthorized by the parole statute, and with the assistance of counsel brought this action individually and on behalf of a class to challenge the legality of the guidelines. (App. 3-15.) Geraghty sought a prompt determination of whether the case could be maintained as a class action by filing a motion to certify

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at 1. The percentage of prisoners who are denied parole has varied from 41.2% in fiscal year 1975 to 46.7% in fiscal year 1976 to 55.9% in fiscal year 1977. Id. at 7.

9 In their Return and Answer (App. 24-27), petitioners admitted the allegation of paragraph 27 of the Complaint (App. 10) that a prisoner sentenced under 18 U.S.C. §4208(a)(2) (1970) (renumbered as 18 U.S.C. §4205(b)(2) in the PCRA) is considered for parole under the same guidelines as a prisoner who had received a regular adult sentence.

the case as a class action with his complaint. (App. 17.) In addition, Geraghty sought interim individual relief so that his personal claim would not be rendered moot by the impending expiration of his sentence. (App. 18, 19.)

Without ruling on Geraghty's motions,[10] the District Court for the District of Columbia[11] transferred the case to the Middle District of Pennsylvania (App. 1), where Geraghty was then confined. Following transfer of the case, Geraghty renewed his request for class certification and his application for interim relief.[12] The district

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10 Geraghty's attempt to remedy this inaction by recourse to a writ of mandamus was denied without opinion. In re Geraghty, No. 76-1975 (D.C. Cir., Nov. 16, 1976).

11 The case had been filed in the District of Columbia as a related case to Cale v. Attorney General, No. 75-1822 (D.D.C.), appeal dismissed as moot, 543 F.2d 416 (D.C. Cir. 19786) (table). Cale had been brought as a non-class "test case" by four of Geraghty's co-defendants, and raised the same issues subsequently advanced by Geraghty. Cale, though, became moot when the interests of the named plaintiffs was extinguished by their release from prison. It was because of the possibility of mootness that Geraghty brought this case as a class action.,

12 Geraghty also filed an amendment to his complaint, adding an individual habeas corpus claim and joining the Warden of the Allenwood Prison Camp as a party. (App. 20-23.) It is this amendment which brought into the case the issues which



court, however, postponed ruling on the class motion until it was ready to announce its decision on defendants' motion for summary judgment. (The district court never ruled on the application for interim relief.)

In the view of the district court, the case was a habeas corpus action (Pet.App. 80a), to which Rule 23 of the Federal Rules of Civil Procedure was applicable only "by analogy." (Pet.App. 81a-82a.) Under this analogy, class treatment was denied on the ground that it was "neither necessary nor appropriate." (Pet.App. 82a.) Class certification was not "necessary," the district court reasoned, because the class claims could be litigated in an individual action. (Pet.App. 82a.) Class status was deemed to be inappropriate because the issues raised in Geraghty's amendment to the complaint (the individual habeas corpus claim) "have no class wide applicability" (id.), because "not all members of the class have the same interest as plaintiff" (id.), and because the district court "does not have habeas corpus jurisdiction over all members of the proposed class." (Pet.App. 83a.)

On the merits, the district court rejected all of Geraghty's substantive contentions. (Pet.App. 83a-92a.)

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"relate solely to plaintiff's individual case" mentioned in the opinion of the district court (Pet.App. 82a) as grounds for refusing to allow the case to be maintained as a class action. Geraghty excluded the denial of individual habeas corpus relief from his notice of appeal (App. 29), and those issues are not involved in the present proceeding.

Geraghty filed a timely notice of appeal. (App. 29.) Thereafter, Eliezer Becher, another prisoner who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, sought to intervene. (App. 2.) As Becher explained in his petition, intervention was sought to insure that the legal issues raised by Geraghty on behalf of the class "will not escape review in the appeal in this case[13] The district court denied the petition to intervene, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction. (App. 2.) Becher then filed a timely notice of appeal from the denial of intervention (id.), and the two appeals were consolidated. (Pet.App. 1a.)

Although the court of appeals expedited the appeals, its decision came after Geraghty had satisfied his sentence.[14] In a comprehensive opinion, Judge Adams held that Geraghty's release from custody did not render the case moot if the district court had erred in refusing to certify the case as a class action. (Pet.App. 10a-28a.) Turning to the class issue, the court of appeals held that the district court should not have viewed the case as a

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13 Petition to Intervene after Judgment, filed April 28, 1977, at 2.

14 Geraghty was mandatorily discharged pursuant to 18 U.S.C. §4164 on June 30, 1977, and satisfied his sentence eight months later, in February of 1978.



habeas corpus proceeding (Pet.App. 7a-10a) or concluded that Rule 23 was applicable only "by analogy." (Pet.App. 28a.) Rather, the case was an ordinary civil action (Pet.App. 7a-10a), subject to the class action standards of Rule 23. (Pet.App. 28a.) Noting that Rule 23 did not include a "necessary" standard as had been employed by the district court, the court of appeals held that the district court had erred in relying on this rationale in refusing to allow the case to proceed as a class action. (Pet.App. 28a.) The case was therefore remanded to the district court with instructions to determine if the proposed class (or, if necessary, a narrower class or subclasses) could satisfy the requirements of Rule 23(a). (Pet.App. 32a & n.66.)

The court of appeals viewed the merits of the substantive class claims only so far as it was necessary to determine that a remand would not "improvidently dissipate judicial effort," which would have been the case if the "district court were correct in its determination that Geraghty's substantive contentions are devoid of merit." (Pet.App. 32a-33a.) The court of appeals noted that material facts were in dispute (Pet.App. 36a n.75), and followed the ordinary rule of viewing the evidence in the light most favorable to Geraghty, the party who had opposed the grant of summary judgment. (Pet.App. 36a.)

Geraghty's substantive contentions were analyzed by the court of appeals in two categories -- whether the parole guidelines are contrary to the parole statute

(Pet.App. 33a-54a), and whether, as applied to certain prisoners, the guidelines are of ex post facto effect. (Pet.App. 46a-65a.) After a careful analysis of the language of the parole statute (Pet.App. 36a-39a), of its legislative history (Pet.App. 39a-46a), and of the constitutional problems which would be present if the guidlines "function as Geraghty alleges" (Pet.App. 48a) and "as automatically as Geraghty alleges" (Pet.App. 52a), the court of appeals concluded that the question of whether the guidelines are consistent with the statute stated claims which "may be disposed of only on a full record." (Pet.App. 54a.) The ex post facto claim was also held to be incapable of resolution on the record before the court. (Pet.App. 65a.)

Rehearing and a suggestion that the case be reheard in banc were denied without opinion. Following issuance of the judgment of the court of appeals, plaintiff moved to add, under Rule 20 of the Federal Rules of Civil Procedure, several prisoners with live personal claims as additional plaintiffs, and the district court received memoranda and held a preliminary hearing on the class question. With the grant of certiorari, however, proceedings in the district court have been stayed, with the court withholding its ruling on the class motion and on the motion to add additional plaintiffs.



## SUMMARY OF ARGUMENT

**Introduction**

This case involves the legality of the guidelines promulgated by the United States Parole Commission (hereafter the "board") in its attempt to comply with 18 U.S.C. §4203(a)(1) (1976), which requires the board to promulgate guidelines to regulate the exercise of its discretion to make parole release decisions. The primary claim asserted by respondent in his class action complaint is that the policies implemented by the guidelines are contrary to those authorized by Congress in the Parole Commission and Reorganization Act ("PCRA"), 90 Stat. 219-31 (1976). The parole board does not deny that it continues to apply the policies challenged in this case to deny parole to unnamed members of the putative class, some of whom have sought to individually participate in these proceedings. Nonetheless, the board's primary arguments are that this case is moot (Pet.Br. 21-43), and that the case may not be maintained as a class action. (Pet.Br. 43-51.) As we show in Part I of our argument, these mootness and class arguments are without merit. In Part II, we show that the same is true for the board's attempt to defend the legality of its guidelines.

## I

1. The mootness question raised by petitioners was answered by the Court in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977). Respondent brought this case as a class suit and diligently sought a ruling from the district court that the case could be maintained as a class action. Although the district court refused to certify the case as a class action, under McDonald, its adverse class determination was subject to effective appellate review on respondent's appeal from the final decision. This was the basis for the Court's rejection of the "death knell" doctrine in Coopers & Lynbrand v. Livesay, 437 U.S. 463 (1978), and for the holding in Gardner v. Westinghouse, 437 U.S. 478 (1978) that an adverse class determination is not appealable as the denial of a preliminary injunction. Petitioners' argument that these cases are contrary to the "case or controversy" requirement of Article III ignores the fact that there is a continuing controversy between petitioners and the unnamed members of the putative class, and that because respondent has diligently sought to act on behalf of the class, he may continue to do so, irrespective of the status of his personal claim.

2. This case does not present the abstract question posed in the Petition for Writ of Certiorari pertaining to a district court's obligation to "sua sponte" evaluate the use of subclasses before refusing to allow a case to be maintained as a class action. Class certification was



denied in this case by the district court for a variety of reasons, including its concededly erroneous conclusion that this was a habeas corpus proceeding to which Rule 23 did not apply, and for which class relief could only be fashioned if "necessary." On this basis, there was no opportunity for the district court to sua sponte consider sub-classes; nor was there any reason for respondent to propose sub-classing when the district court did not rule on the class motion until it announced its final decision, at which time a request for reconsideration of the adverse class determination would have been a useless act.

## II

Three revolutionary policies are implemented by the federal parole guidelines. First, rehabilitation is not a factor in the parole release decision. Second, the severity of a prospective parolee's offense is rated in a mechanical fashion, without regard to the facts of the particular case and irrespective of the actual sentence imposed or which could have been imposed. Third, a prisoner can do nothing once he is incarcerated to improve his chances for parole. The central question presented in this case is whether these parole policies have been authorized by Congress. The answer furnished by the court of appeals, reviewing the district court's

grant of summary judgment upholding the guidelines, is that these policies are unlawful. We agree.

1. There is nothing novel about the use of guidelines to aid in parole release decisionmaking. For at least 50 years, guidelines have been used by some parole boards to aid in the determination of when parole should be granted.

2. Many parole boards, though, have been unwilling to rely on statistical aids in making the "equity judgments" involved in the parole release decision. The researchers who created the federal parole guidelines viewed this as a problem of "research utilization," and addressed the problem of how their product should be "packaged" for wider use.

3. The result of this "packaging" effort is a product known as "descriptive guidelines," which purport to objectively describe in a table the way in which the board had been making discretionary decisions. The theory is that these guidelines do not create new policy, but merely insure that fewer decisions will be made in other than the average manner. Whatever the merits of this theory, it was not fairly applied in the creation of the parole guidelines.

4. The first problem with the "descriptive guidelines" created for the board is that they are not descriptive. At best, the guidelines purport only to describe the way in which the board was making release decisions in Youth



Correction Act cases, where all commitments are purely indeterminate. The board's implicit policies in YCA cases, though, were unlawful, because those policies ignored the rehabilitative purpose of the YCA. In addition, the YCA policy -- even if lawful -- was ill suited for application to the 75% of adult prisoners who must serve one-third of their sentence before even becoming eligible for parole.

5. The second problem with the "descriptive guidelines" created for the board is that they completely fail to describe any of the policies which had been followed by the board. The "objective measures" created for the parole guidelines did not reify the YCA policies, but vastly altered the way in which the board made its decisions, and created a new prospective policy, in which rehabilitation and prison performance are irrelevant, and the parole release decision has become a resentencing decision.

6. Congress has not approved the board's revolutionary redefinition of parole. The PCRA emphasizes rehabilitation and prison behavior, and does not authorize the board to resentence prisoners.

We agree with petitioners that the proceedings on remand in the district court will be a formality, because we will have little difficulty in proving whatever facts may still be genuinely disputed by petitioners.

## ARGUMENT

### I. THIS CONTINUING CONTROVERSY BETWEEN ADVERSE PARTIES IS NOT MOOT

There is no dispute that this case presents a live justiciable controversy between the parole board and the unnamed members of the putative class about the legality of the federal parole guidelines.[15] The only real question raised by petitioners' mootness arguments is whether the extinction of respondent's personal claim before the district court could properly apply the standards of Federal Rule of Civil Procedure 23 to respondent's timely request that the case be maintained as a class action bars him from continuing to represent the unnamed members of the putative class.

This jusi tertii[16] question, however, was answered in favor of continuing justiciability in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), Coopers & Lynbrand Livesay, 437 U.S. 463 (1978), and Gardner v. Westinghouse, 437 U.S. 478 (1978). In McDonald, the

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15 Pursuant to 18 U.S.C. §4218, the legality of the parole guidelines is expressly subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§701-705. As petitioners acknowledge (Pet.Br. 13 n.7), jurisdiction to consider this challenge to the guidelines was conferred upon the ditsriet court by 28 U.S.C. §1331.

16 See Kremens v. Bartley, 431 U.S. 119, 142 (1977) (Brennan, J., dissenting).



Court held that "a district court's refusal to certify [a case as a class action] was subject to appellate review after final judgment at the behest of the named plaintiffs," 432 U.S. at 393, even though the original class representatives had obtained all of the individual relief sought.[17] This holding was the basis for the Court's subsequent rejection of the "death knell" doctrine in Coopers & Lynbrand v. Livesay, supra, and for the holding of Gardner v. Westinghouse, supra, that a district court's refusal to certify was not immediately appealable as the denial of a preliminary injunction. Essential to each of these cases is the principle that an original class representative may continue to represent the unnamed members of the class to prosecute an

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17 Petitioners mistakenly assert (Pet.Br. 38-39) that the plaintiffs in McDonald had not obtained all of the individual relief sought. The final decision entered in the district court in McDonald, though, recited that the complaints of the original and intervening plaintiffs

> are hereby dismissed with prejudice, all matters in controversy with respect to such claims having been settled and resolved. Appendix, United Air lines, inc. v. McDonald, O.T. 1976, No. 76-545, 92.

Thus, petitioners are factually in error in their attempt to characterize McDonald as a case in which the plaintiffs had "not obtained all of the relief that [they] sought." (Pet.Br. 39.)

appeal on their behalf from an adverse class determination. See McDonald, supra at 400 (Powell, J., dissenting).

Petitioners here, and in Fidelity National Bank v. Roper, No. 78-904, nonetheless seek to argue that the case or controversy limitation of Article III bars a litigant who has faithfully, albeit unsuccessfully, sought to act on behalf of a class from seeking review of the district court's refusal to certify if the litigant's personal claim has been extinguished before there can be effective appellate review on an appeal from the final decision. These arguments would reduce McDonald, Coopers & Lynbrand and Gardner to hollow shells and have no place in this case, which continues to present a live controversy between adverse parties. But before discussing the flaws in petitioners' mootness arguments, we turn to petitioners' major premise that the court of appeals erred in remanding the case for consideration of the class issue under the standards of Federal Rule of Civil Procedure 23.

### A. THE FEDERAL PAROLE GUIDELINES MAY BE CHALLENGED IN A CLASS SUIT

Respondent brought this case to challenge the legality of the federal parole guidelines, both on their face and as applied.[18] Mindful of the possibility of

18 The primary claim, applicable to all federal prisoners who are considered for parole, is that the guidelines are contrary to the Parole Commission and Reorganization Act ("PCRA"), Pub.L. 94-233, 90 Stat. 219-33 (1976), or that the PCRA is itself unlawful. A second claim, applicable only to persons imprisoned for offenses committed prior to the effective date of the PCRA, is that the guidleines -- if consistent with the PCRA --are of ex post facto effect. A third claim, applicable only to persons sentenced under 18 U.S.C. §4208(a) (1970) (renumbered as 18 U.S.C. §4205(b) in the PCRA), is that the guidelines are inconsistent with the statute. At the time the lawsuit was filed, respondent had standing to raise each claim -- he had been denied parole through application of the guidelines, and he had been sentenced under 18 U.S.C. §4208(a)(2) (1970) for wrongdoing charged in a pre-PCRA indictment.



mootness if he was unsuccessful in obtaining individual interim relief,[19] respondent followed the suggestions made by the Court in prior cases and brought this case as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[20]

19 Interim individual relief was unsuccessfully sought with the filing of the complaint. (App. 18, 19.)

20 See, e.g., Brockington v. Rhodes, 396 U.S. 41, 43 (1969) (plaintiff "did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future"); De Funis v. Odegaard, 416 U.S. 312, 314 (1974) (plaintiff had "brought the suit on behalf of himself alone, and not as the representative of any class");' Preiser v. Newkirk, 422 U.S. 395, 404 (1975 (Marshall, J., concurring) ("for some reason respondent did not file this case as a class action).

Respondent's complaint contained detailed factual allegations of each of the prerequisites for a class action of Rule 23(a).[21] There has never been any dispute that the number of persons adversely affected by the guidelines is so numerous as to make joinder impractical,[22] and the common questions of law presented in this case are plainly set out in the complaint. (Complaint, ¶5(b), App. 4.) There is nothing atypical about respondent's challenge to the guidelines -- the factual allegations supporting the claims advanced in the complaint (Complaint, ¶17-¶52, App. 7-15), are related to

21 Federal Rule of Civil Procedure 23(a) provides as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class.

22 Each year approximately 4000 prisoners are denied parole. Even if the plaintiff class is limited to those persons in custody because they have been denied parole, the class would plainly be of sufficient numerosity to make joinder impracticable. See 1 Newberg, Class Actions 171-76 (1977).



respondent's personal situation only insofar as necessary to show that he has standing to raise each of those claims.[23] Finally, respondent has diligently protected the interests of the putative class, first by promptly requesting (in a motion filed with his complaint (App. 17)), that the case be certified as a classaction, and by continuing to champion the interests of the putative

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23 As a person who was denied parole through application of the guidelines, respondent plainly possessed standing to challenge their legality. East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395 (1977). In addition, because he was sentenced under 18 U.S.C. §4208(a)(2) for offenses committed prior to the enactment of the PCRA, respondent had standing to bring the ex post facto claim raised in the complaint, and the claim pertaining to the repeal by administrative fiat of Section 4208(a). Petitioners' arguments to the contrary (Pet.Br. 76) confuse the question of standing to bring an action with the question of entitlement to relief on the merits. See United States v. Scrap, 412 U.S. 669 (1973).

Nor is there any merit to petitioners' assertion (Pet.Br. 50 n. 40) that part of the class claim is the allegation that respondent's "offense was rated too severely under the guidelines. Such an allegation does not appear in the original complaint, but was included in the individual habeas corpus claim, filed as an amendment to the complaint. (App. 20-23.) Respondent did not seek to maintain his individual habeas corpus challenge as a class action. The comment of the district court (Pet.App. 82a) that the issues raised in the complaint "have no class wide applicability" is irrelevant.

class through proceedings in the district court, in the court of appeals, and in this Court.[24]

The district court held that Federal Rule of Civil Procedure 23 was inapplicable to this case,[25] and refused to allow it to proceed as a class action. The court of appeals reversed, holding that the case was governed by Rule 23. Although the court of appeals recognized that numerous federal prisoners were adversely affected by the guidelines (Pet.App. 26a), that the case presented common questions of law and fact (Pet.App. 31a), that the nuances of the "major issues in the case in no way appear to be tied to individual fact patterns" (Pet. App. 28a), and that respondent's attorneys had vigorously represented the interests of the

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24 In addition, respondent appeared as amicus curiae in Garcia v. United States Board of Parole, 557 F.2d 100 (7th Cir. 1976). See id. at 107 n.7. Also, the Lewisburg Prison Project, the organization sponsoring respondent's efforts, appeared as an amicus curiae in United States v. Addonizio, ___ U.S. ___ (No. 78156, June 4, 1979).

25 The district court viewed this case as a habeas corpus proceeding (Pet.App. 81a), for which it held that class relief could only be fashioned under the "necessary and appropriate" standards of the All Writs Act, 28 U.S.C. §1651. (Pet.App. 81a-83a.) Although petitioners urged this view of the case in the district court and in the court of appeals, they now concede that this is not a habeas corpus proceeding (Pet.Br. 13 n. 7), and that the class issues are controlled by Rule 23 of the Federal Rules of Civil Proceure. (Pet.Br. 43-51.)



putative class (Pet.App. 27a), it declined to certify the case as a class action in the first instance.[26] (Pet.App. 32a.) In accord with the observation of then Circuit Judge (and now Attorney General) Bell in Oatis v. Crown Zellerbach, 398 F.2d 496, 499 (5th Cir. 1968), that further proceedings in the district court "might be facilitated by the use of subclasses,"[27] the case was remanded to the district court for further consideration of the class action question under the standards of Rule 23.

Petitioners offer two arguments in support of their claim that the court of appeals erred in holding that a class may be certified in this case and in requiring reconsideration of the class issue under the proper standards. These arguments are equally without merit.

1. As we pointed out in our brief in opposition at 13, petitioners are in error in their repeated assertion (Pet. Br. 44, 47) that the court of appeals upheld the conclusion of the disrict court that there are conflicting

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26 Cf. East Texas Motor Freight, Inc. v. Rodriquez, 431 U.S. 395, 403 (1977) (reserving question of whether a case may be certified as a class action on appeal).

27 The opinion of then Judge Bell in Oatis v. Crown Zellerbach, supra, is contrary to the position asserted by petitioner Attorney General Bell here, that "it is frequently preferable simply to deny certification" rather than to define subclasses." (Pet.Br. 49).

interests within the class proposed in the complaint. On the contrary, the court of appeals concluded that "it is not clear that a divergence of interest exists [within the putative class]." (Pet.App. 3la.) This follows from the fact that a successful challenge to the guidelines because they are unlawful will have the same effect regardless of the definition of the plaintiff class: If the present guidelines are unlawful because they are contrary to the PCRA, the board will be required to promulgate new guidelines, and it will not, of course, be able to apply its unlawful guidelines to any prisoners. Under these circumstances, in our view, there is no need to exclude from the plaintiff class any prisoners who may wish the present guidelines to be upheld -this is the "rare case in which a court could use the class opponent to protect the interests of absentee class members." Developments in the Law — Class Actions, 89 Harv.L.Rev. 1318, 1481 (1976).[28] But if the district court disagrees, it may allow the case to be maintained as a class action on behalf of a narrower class, as we suggested before remand

28 In a case challenging the legality of an administrative regulation, reliance upon the agency to protect the interests of any members of the putative class who may wish to see the validity of the regulation upheld is not inconsistent with Hansberry v. Lee, 311 U.S. 32 (1940). See Developments, supra, 89 Harv.L.Rev. at 1482 n. 155; Bolden v. Pennsylvania State Police,. 578 F.2d 912, 918-19 (3d Cir. 1978).



proceedings were stayed after the grant of certiorari.[29] See Eisen v. Carlisle & Jacquelin, 417 U.S.156, 179 n. 16 (1974), Manual for Complex Litigation, §1.41 (1973).

2. Petitioners are also in error in their contention that respondent is somehow an inadequate class representative because he did not "move for reconsideration or propose that subclasses be created." (Pet.Br. 46-47.) This contention ignores the fact that the district court, in a single order, refused to allow the case to be maintained as a class action and denied relief on the merits. At that point, no purpose -- other than delay -- would have been served by moving for reconsideration or in proposing more limited classes, and respondent can hardly be faulted for not having done a useless act.

First, in ruling adversely on the class issue, the district rejected our repeated contentions that this was

29 For example, the class could be redefined to be all federal prisoners who will be denied parole because their sentences are too short to allow them to serve the "customary length of imprisonment" of the guidelines, and who will be denied parole and continued to expiration of their sentences. Respondent was a member of this subclass, which would, of course, have standing to challenge the legality of the guidelines, and would be of sufficient numerosity to make joinder impractical: Information provided by the board in this case shows that from October of 1977 to March of 1978, 1635 prisoners were denied parole and "continued to expiration" because their sentences were too short to allow them to serve the "customary length of imprisonment" of the guidelines.

"an ordinary civil action to which the class act provisions of the Federal Rules of Civil Procedure [apply] . . . " (Pet.App. 81a n. 8.) There is no reason to believe that a request to reconsider the resolution of this issue would have been other than a waste of time.

Second, there would have been no purpose in pointing out to the district court that Rule 23(c)(4) had been adopted in 1966 to give the court authority to allow a case tp be maintained as a class action with respect to particular isssues or to divide the class into appropriate subclasses.[30] See 7A Wright & Miller, Federal Practice and Procedure §1979, at 185. The perceived over-inclusiveness of the class was only one of several reasons for the district court's conclusion that class status was "inappropriate,"[31] and proposing that the case be main-

30 Although the complaint detailed the four common questions presented in the case (Complaint, ¶5(b), App. 4), the district court viewed the question of whether the case could be maintained as a class action as depending upon whether each of these four questions was common to the broad class proposed in the complaint. (Pet.App. 82a-83a.) This was plainly in error: Rule 23(c)(4) vested the district court with ample power "to treat common things in common and to distinguish the distinguishable." Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968). See 7A Wright & Miller, Federal Practice and Procedure, §1790 at 186.

31 In addition to the perceived overinclusiveness of the class proposed in the complaint, the district footnote continued



tained as a class action on behalf of sub-classes plainly would not have resulted in a favorable class determination in the district court.

Finally, the district court did not rule on the class issue until it announced its decision on the merits.[32] Because an appeal was necessary to challenge the correctness of the disposition on the merits, little point would have been served by postponing appellate review while we renewed our requests for class certification in the district court.

3. The record in this case simply fails to present the question argued by petitioners (Pet.Br. 43-51) about the alleged need for a district court to sua sponte construct sub-classes after "properly" determining that there is a divergence of interests within a class proposed in a complaint. This case did not present any opportunity for sua sponte action under Rule 23(c)(4) because the district

court held that class certification would be "inappropriate" because it did "not have habeas corpus jurisdiction over all the members of the proposed class." (Pet.App. 83a.)

32 This was contrary to Rule 23(c)(1), which requires that a district court rule on class status "[a]s soon as practicable after the commencement of an action brought as a class action." If the district court had ruled on the class motion before it announced its decision on the merits, and denied class status because of overinclusiveness of the class proposed in the complaint, it is obvious that we would have proposed a narrower class, as we have done in the district court following remand.

court did not believe that Rule 23 applied. Thus, there is no occasion in this case for the Court to consider whether district courts may continue to exercise their discretion to "define those subclasses proper to prosecute an action without being bound by the plaintiff's complaint." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 184-85 (1974) (Douglas, J., dissenting in part). Nor, as we show below, is there any occasion for the Court to require that the unnamed members of the putative class start this litigation anew in the district court.

### B. THE UNNAMED MEMBERS OF THE PUTATIVE CLASS NEED NOT COMMENCE THIS ACTION ANEW IN THE DISTRICT COURT

This is the second case to challenge the federal parole guidelines because they seek to apply unlawful Youth Correction Act release policies to adult offenders. See Part IIC(i) below. This first action had been brought as a non-class "test case," see Katz v. Carte Blanche, 496 F.2d 757, 758 (3d Cir. 1974) (en banc), and became moot with the release from custody of the named plaintiffs.[33] This action is the successor to the "test

33 Cale v. Attorney General, No. 75-1822, D.D.C., appeal dismissed as moot, 515 F.2d 416 (D.C. Cir. 1976) (table). Respondent had unsuccessfully sought to participate in Cale by seeking to be added as an additional plaintiff in the district court under Rule 20 of the Federal Rules of Civil Procedure, and by

footnote continued



case,"[34] and -- as stated in the "Motion to Certify Class" (App. 17) -- was brought as a class suit "to insure that the issues in this case, which are capable of repetition, will not evade review."

Notwithstanding our repeated requests for class certification -- requests which commenced with the filing of the complaint (App. 17) -- the district court refused to allow the case to be maintained as a class action, and respondent was released from custody before the court of appeals could reverse the district court's

requesting that the court of appeals consolidate his appeal from the subsequent denial of the Rule 20 motion with the then pending interlocutory appeal in Cale, and by then -- after that application was denied -- by seeking to intervene in Cale in the court of appeals. This final attempt to participate in Cale was also unsuccessful; the appeal from the denial of rthe Civil Rule 20 motion was voluntarily dismissed after the commencement of this action.

34 This case was filed in the same district, and before the same judge to whom Cale v. Attorney General, supra, had been assigned. The relationship between the two cases was shown by respondent's request for interim relief (App. 19), which was "based on evidentiary material and memorandum filed in the related case of Cale v. Attorney General, Civil Action No. 75-1822." (Id.) No ruling was ever made on this motion, or on the companion motion for an expedited hearing. (App. 18.) Respondent's attempt to remedy this inaction by resort to a writ of mandamus was unsuccessful. In re Geraghty, No. 76-1975, D.C. Cr., mandamus denied without opinion, November 16, 1976.

adverse class determination.[35] Although respondent has continued to represent the interests of the unnamed members of the putative class irrespective of the status of his personal claim, and notwithstanding the fact that unnamed members of the putative class have sought to individually participate in this case,[36] petitioners argue

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35 Although there is no dispute that respondent's personal claim has been extinguished, we disagree with petitioners' contention (Pet.Br. 21-23) that respondent's personal claim became moot when he was mandatorily released from prison on June 30, 1977. Pursuant to 18 U.S.C. §4164, respondent served the remaining eight months of his sentence "as if released on parole," and until respondent completely satisfied his sentence, the district court had the power to fashion relief, e.g., to require that the time "as if released on parole" be reduced or eliminated.

36 The Court plainly has jurisdiction to allow unnamed members of the putative class to be substituted as respondents or, alternatively, to intervene. Mullaney v. Anderson, 342 U.S. 415, 417 (1952); Rogers v. Paul, 382 U.S. 198 (1965). Because intervention was sought before the decision of the court of appeals had reached a final adjudication, intervention is timely. United Air Lines, Inc. v. McDonald, supra, 432 U.S. at 395. n.16.

Petitioners' argument to the contrary (Pet. Br. 42-43) is based upon cases where intervention was sought after a case had reached a final adjudication, Black v. Central Motor Lines, 500 F.2d 407 (4th Cir. 1974) (intervention sought one year after entry of consent decree), Clover v. Collins, 177 F.2d 234 (7th Cir. 1949), or where

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intervention was sought to create subject matter jurisdiction, Schmoll Fils, Inc. v. The Fernglen, 85F.Supp. 578 (S.D.N.Y. 1949), or to establish venue, Levenson v. Little, 75 F.Supp 575 (S.D.N.Y. 1948), or where a motion to substitute parties was made after expiration of the the then two year time limit of Civil Rule 25, Hofheimer v. McIntee, 179 F.2d 789 (7th Cir. 1949).

The only relevant case cited by petitioners is Becton v. Green County Board of Education, 32 F.R.D. 220 (E.D.N.C. 1963), a case brought before the 1966 amendments to Rule 23 on behalf of six school schildren to challenge a segregated public school. Intervention was sought by other school children after the named plaintiffs had graduated, moved, or dropped out, and was denied as untimely, 32 F.R.D. at 223, and, alternatively, on the theory urged here by petitioners, id. at 222-23. But as the Court of Appeals for the Second Circuit later held, the better view is to allow intervention in the circumstances of Becton, in the interests of judicial economy when, as here, the intervenors could file a new action raising the same claims already at issue. Ruller v. Volk, 351 F.2d 323, 328 (2d Cir. 1965). Accord, Miller & Miller Auctioneers v. G.W. Murphy Ind. Inc., 472 F.2d 893, 895-96 (10th Cir. 11973); Healy v. Edwards, 363 F.Supp. 1110, 1112-13 (E.D.La. 1973) (3 judge court), vacated on other 421 U.S. 772 (1975).

Nor is there any merit to petitioners' argument (Pet.Br. 41 n. 30) that addition of a prisoner incarcerated at a federal correctional institution in North Carolina would create unnecessary "practical problems." The same guidelines are used uniformly throughout the country, and as the court of appeals correctly concluded (Pet.App. 28a), claims at issue

footnote continued

that yet another suit must be brought, i.e., that the decision of the court of appeals reversing the district court's adverse class determination is a nullity because respondent's personal claim was extinguished before the appeal could be decided, and the case certified as a class action on remand.

It is obvious that considerations of judicial economy do not support petitioners' claim of mootness. Nor, as we show below, are petitioners' arguments supported by the case or controversy requirement of Article III.

1. The Continuing Functional Adversity

The parole board continues to apply the policies challenged in this case in the ten thousand or so release decisions it makes each year,[37] and acknowledges (Pet. Br. 52 n. 41) that it will abandon those nationwide

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in this case do not turn on the nuances of individual facts. In addition, the record in this case shows that the "practical problems" alluded to by petitioners -- the difficulty in communication between a prisoner and counsel who practices in a different area, Starnes v. McGuire, 512 F.2d 918, 929-30 (D.C. Cir. 1974) (en banc) are illusory: The affidavit filed in the district court by Mr. Gillis, the prospective additional respondent incarcerated in North Carolina, shows that he has spoken with respondent's principal attorney at the North Carolina correctional facility.

37 See note 8 supra.



policies if this Court affirms the decision of the court of appeals. Thus, there can be no question about the "continuing existence of a live and acute controversy," Steffel v. Thompson, 415 U.S. 452, 459 (1974) (emphasis in original), with respect to the legality of the federal parole guidelines. Nor can it be said that the putative plaintiff class "lack[s] a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). If, on remand, the district court concludes that the case may be maintained as a class actions, its final decision will "include and describe those whom the court finds to be members of the class." Federal Rule of Civil Procedure 23(c)(3). The unnamed members of the putative class therefore continue to have "a personal stake in the outcome of this case." Baker v. Carr, 369 U.S. 186, 204 (1962).

As the court of appeals observed (Pet.App. 27a), respondent's attorneys are vigorously representing the interests of the unnamed members of the class, several of whom, acting through respondent's attorneys, have sought to individually participate in these proceedings, both in the district court, the court of appeals, and in this Court. Even though the personal claims of many of these prospective additional named plaintiffs have also been extinguished by the passage of time,[38] it can be

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38 The evanescent nature of any individual challenge to the legality of the parole guidelines is shown by

"safely assume[d] that [counsel for respondent have] other clients with a continuing live interest in the case." Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975). Under these circumtances, there is a live controversy between adverse parties, satisfying the case or controversy requirement of Article III.

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the extinction or impending extinction of the personal claims of the prospective additional respondents-petitioning -intervenors.

Harry Cardillo was mandatorily released under 18 U.S.C. §3164 on July 3, 1979, after his attempt to gain relief through an individual habeas corpus proceeding was unsuccessful. Cardillo v. United States Parole Commission, No. 77-874, M.D.Pa., Mem.Op., July 17, 1978, aff'd without opinion, No. 78-2363, 3d Cir., March 6, 1979, certiorari pending No. 78-6620.

James Rust was mandatorily released on April 23, 1979; his individual habeas corpus proceeding was dismissed as moot on May 12, 1979, Rust v. Warden, No. 78-945, M.D.Pas. David Gillis and James Taylor are due for imminent release -- Gillis will soon be mandatorily released, and Taylor has a "presumptive parole" date in December of 1980. Millard V. Hubbard started to serve his ten year federal sentence on January 3, 1979, following a successful habeas corpus challenge to his state court conviction. Hubbard was re-tried and acquitted of the state charges, and is presently seeking resentencing on his federal conviction pursuant to United States v. Tucker, 404 U.S. 443 (1972)



2. Petitioners' Sterile Claim of Mootness

Notwithstanding the continued functional adversity presented in this case, petitioners seek to argue that the unnamed members of the putative class must commence this litigation anew. (Pet.Br. 42.) As do the petitioners in Fidelity National Bank v. Roper, No. 78-904, petitioners here seek to extract from prior decisions of this Court the proposition that unless an individual litigant's claim is "so inherently transitory" (Pet.Br. 35), a case that is incorrectly refused class certification becomes moot whenever the personal claim of the class representative is extinguished before the adverse class determination can be corrected on appeal.

The primary flaw in petitioners' mootness theory is that it imparts jurisdictional substance to a Rule 23 class certification order. But as the Court recently noted, "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978). And as amicus points out,[39] class "certification" and class "denial" are not based upon Article III, but are concepts adopted in the 1966 amendments to the Federal Rules of Civil Procedure.

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39 Brief Amicus Curiae of National Clients Council, Inc., et al. at 14-15.

A second defect in petitioners' mootness theory is that it is contrary to the Court's holding in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), that class plaintiffs can pursue appellate review of adverse class determinations after satisfaction of their individual claims. Id. at 393 n. 15. Petitioners' attempt to distinguish McDonald (Pet.Br. 37-39) is factually in error. In McDonald, the personal claims of the original plaintiffs had been fully satisfied, see note 17 supra, and the Court nonetheless held that the original plaintiffs could prosecute an appeal from the final decision to challenge the adverse class determination. Also, as petitioners admit (Pet.Br. 40 n.29), their theory of mootness would render meaningless the Court's recent decisions in Coopers & Lynbrand v. Livesay, 437 U.S. 463 (1978), and Gardner v. Westinghouse, 437 U.S. 478 (1978).

i. A Lack of Certifiability

It is therefore not surprising that petitioners' mootness theory is without support in the decisions of the Court upon which they would rely. For example, petitioners cite Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975), Pasadena City Board of Education v. Spangler, 427 U.S. 430 (1976), and Weinstein v. Bradford, 423 U.S. 147 (1975), as setting out the broad rule that a case must have been duly certified as a class



action if it is to survive the extinction of the personal claim of the class representative. (Pet.Br. 27-28.) But unlike the present case, none of these cases was "certifiable" when it reached this Court.

In Jacobs, six high school students had complained of a denial of their First Amendment rights in the distribution and publication of a school newspaper. Although the case had been brought as a classs action, the district court's final judgment did not describe "those whom the court finds to be members of the class," as required by Rule 23(c)(3). The named plaintiffs, who had purported to act on behalf of a class, made no complaint on appeal of the district court's failure to have entered judgment in favor of anyone other than the named parties. The result was that the only parties before the Court were the defendants and the original plaintiffs, all of whom had graduated from high school, and none of whom would ever again run afoul of the challenged practices. The case was therefore moot.

Similarly, in Pasadena City Board of Education v. Spangler, supra, while the case had been brought as a class suit, "there had been no certification of any such class which is or was represented by a named party to this litigation." 427 U.S. at 430. As in Jacobs, the original plaintiffs nad not complained on appeal of the district court's failure to have allowed the case to be maintained as a class action, and could therefore not appear in this Court to assert the interests of the unnamed members of the class.

Finally, in Weinstein v. Bradford, supra, a challenge to state parole procedures had been brought as a class action, but the district court had refused to so certify it and denied relief on the merits. On the prisoner's appeal, the court of appeals reversed and remanded on the merits, making no mention of the class issue. 519 F.2d 728 (4th Cir. 1975). After the state parole officials had successfully petitioned for a writ of certiorari, 421 U.S. 991 (1975), the original class representative suggested to this Court that the entire case had become moot when he was unconditionally discharged from custody. In that setting, where the original class representative had acquiesced in the district court's adverse class determination and was himself the proponent of the suggestion of mootness, the Court was left without a live controversy between adverse parties and had no alternative but to deem the case to be moot. 423 U.S. at 149.

Unlike the prisoner in Weinstein v. Bradford, respondent here has not acquiesced in an adverse class determination. Nor has he abandoned representation of the interests of the unnamed members of the putative class, as did the plaintiffs in Jacobs and Spangler when they did not complain on appeal of the district court's failure to have included unnamed members of the class in its final decision. On the contrary, respondent has litigated this case from the very outset on behalf of the putative class, and because the case is still "certifiable,"



i.e., that there has not been a final adjudication that the case may not be maintained as a class action, and judgment may still be entered in favor of the unnamed members of the putative class, respondent may continue to represent their interests.

In contrast to petitioners' mistaken reliance upon Franks v. Bowman, 424 U.S. 747 (1976) as supporting their claim that class certification is the sine qua non of the class representatives right to represent the unnamed members of the class after his (or her) personal claim has been extinguished, the Court's careful analysis of the mootness question in that case, and its subsequent decision in Memphis Light Gas & Water Div. v. Craft, 436 U.S. 1 (1978), supports our view that, as the court of appeals observed (Pet.App. 2la n.43), it is "certifiability" and not "certification" that allows the class suit to continue irrespective of the status of the personal claim of the original class representative.

In Franks, an employment discrimination case had been duly certified as a class action on behalf of several subclasses. Before the case was decided by this Court, the sole representative of one of the sub-classes had been lawfully discharged from employment, and had obtained a judgment for his personal back pay claim. As do petitioners here, the company in Franks argued that the case was moot because the original class representative had no personal stake in the outcome of the continuing controversy between the company and the

unnamed members of the class about back pay and seniority benefits. 424 U.S. at 752-53.

In rejecting this claim of mootness, the Court did not rely solely on the fact that the case had been dely certified as a class action. Instead, the Court focused on the question of whether "a live controversy [remains] at the time this Court reviews the case,'" id. at 755, quoting Sosna v. Iowa, 419 U.S. 393, 402 (1975), and held that because the case had been duly certified as a class action, the unnamed members of the class would be entitled to relief and therefore possessed a personal stake in the outcome of the case. Id. at 755-57.

That the same analysis would apply to a case which could still be certified as a class action, i.e., that the unnamed members of a putative class continue to possess a personal stake in the outcome of a case brought as a class action as long as it is "certifiable" --is shown by the Court's analysis of the mootness question in Memphis Light Gas and Water Div. v. Craft, supra. That case had been brought as a class action to obtain declaratory and injunctive relief, and money damages for the named plaintiffs. The district court refused to allow the case to proceed as a class action, and denied relief on the merits. The court of appeals affirmed the denial of class certification,[40] but reversed on the merits of the

40 In Craft, the court of appeals had upheld the denial of class certification on the ground that class

footnote continued



individual claim. Although the defendants successfully petitioned for a writ of certiorari, 429 U.S. 1090 (1977), the putative class representative did not cross-petition for review of the adverse class determination. In addressing the threshold question of mootness, 436 U.S. at 7-9, the Court made clear that it would have relied upon the continuing dispute between the defendants and the unnamed members of the putative class in resolving the mootness issue if the court of appeals had reversed the district court's adverse class determination. Id. at 8.

None of the cases cited by petitioners bear upon the context in which the mootness question is presented in this case -- where the case is still "certifiable," and where there is a continuing controversy between the defendants and the unnamed members of the putative

footnote continued

status was unnecessary because any relief granted would "accrue to the benefit of others similarly situated." 534 F.2d at 686. The prime authority cited for this proposition was the decision of ther Eighth Circuit in Ihrke v. Northern States Power Co., 459 F.2d 566, 572, a decision vacated as moot by this Court, 409 U.S. 815 (1972).

Even if Rule 23 required that a class action be "necessary," a requirement properly rejected by the court of appeals in this case (Pet.App. 28a), the fate of the class claims in Craft and Ihrke shows that class status is, in fact, "necessary" whenever there is a possibiilty that the personal claim of the original class representative will be extinguished before the merits of the class claims will be finally adjudicated.

class. Nor is there any merit in petitioners' argument that a decision by the district court on remand that the case should be maintained as a class action will not "relate back" to the time when that order should have been entered -- "as soon as practicable after commencement of the action," Rule 23(c)(1), a time when respondent concededly had a live personal claim.

ii. Relation Back

The "relation back" doctrine is firmly rooted in the common law. See the ancient authorities collected in United States v. Loughrey, 172 U.S. 206, 225-30 (1898). (White, J., dissenting). The doctrine is a "fiction of law adopted by the courts solely for the purpose of justice," Gibson v. Chouteau, 18 Wall. (80 U.S.) 92, 101 (1872), and has been applied to situations where delay is "not attributable to the laches of the parties," Mitchell v. Overman, 103 U.S. 62, 64 (1888), but where "it is the duty of the court to see that the parties did not suffer by the delay." Id.

If a legal fiction is needed to assuage the "case or controversy" requirement, the relation back principle is applicable to cases where, as here, a class representative diligently seeks an order allowing a case to be



maintained as a class action,* but because of the district court's error, the case cannot be maintained as a class action without appellate review. Petitioners, though, would limit application of the relation back principle to cases where any individual's claim "is so inherently transitory." (Pet.Br. 35.) While this claimed limitation on the relation back principle does not square with the narrow reading of Article III urged by petitioners,[41] it is nonetheless met in this case.

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* It is for this reason that petitioners' reliance upon Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977) (Pet..Br. 30) is misplaced. There, the class representative had not moved for class certification before his personal claim became moot, and the question explicitly reserved was "what effect, if any, action by the district court frustrating an attempt by the representative plaintiff to obtain class certification prior to the time his claim is mooted might have on the jurisdictional issue." Id. at 1101 n. 7. Compare Jones v. Califano, 576 F.2d 12, 22 (2d Cir. 1978) (relation back appropriate when class representative had moved for class certification prior to extinction of individual claim). In this case, the motion for class certification was filed with the complaint. (App. 1.)

41 If, as petitioners argue (Pet.Br. 25-26), the extinction of the personal claim of a class representative before a case has been certified as a class action irrevocably deprives an Article III court of jurisdiction over an otherwise continuing controversy, there is no reason why jurisdiction may be resorted to for policy reasons (Pet.Br. 35-36) by the fiction of relation back.

The interest of most federal prisoners in challenging the legality of the federal parole guidelines is temporary in nature, as shown by the extinction, or impending extinction, of the personal claims of the prospective additional respondents.[42] While there might be enough time for a district court to rule on a request that a case be maintained as a class action -- especially when, as in this case, the request is made at the same time the lawsuit is filed -- the evanescent nature of individual claims does not provide enough time for there to be effective appellate review of an adverse class determination, Roe v. Wade, 410 U.S. 113, 125 (1973), and for many prisoners a challenge to the legality of the parole guidelines is "one that is distinctly 'capable of repetition, yet evading review.'" Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975). Under these circumstances, a decision by the district court on remand that the case may be maintined as a class action will "relate back" to the time when that order shjould have been of the action." Federal Rule of Civil Procedure 23(c)(1). See Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978); Bell v. Wolfish, ___ U.S. ___, ___ n.5 (No. 77-1829, May 14, 1979, slip op. 4 n.5.)

Even if the interest of most federal prisoners in challenging the legality of the federal parole guidelines

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42 See note 38 supra.



was not "so inherently transitory," petitioners' limitation on the relation back doctrine would still be in error. That the individual claims in Gerstein v. Pugh, supra, Swisher v. Brady, supra, and Levi v. Wolfish, supra, were of the sort which would be extinguished before the district court "can reasonably be expected to rule on a certification motion," Sosna v. Iowa, 419 U.S. 393 402 n. 11 (1975), does not answer the question presented here, where the district court -- through no fault of respondent -- first failed to heed the admonition of Rule 23(c)(1), and then did not apply the proper standards to our promptly filed request that the case be maintained as a class action. Contrary to petitioners' arguments, the relation back doctrine is fully applicable in these circumstances. See, e.g., Esplin v. Hirschi, 402 F.2d 94, 101 n.14 (10th Cir. 1968); Jimenez v. Weinberger, 523 F.2d 689, 696 (7th Cir. 1975) (Stevens, J.); Ahrens v. Thomas, 570 F.2d 286, 289 (8th Cir. 1978); Knable v. Wilson, 570 F.2d 957, 964 n.46 (D.C. Cir. 1977); Jones v. Califano, 576 F.2d 12, 22 (2d Cir. 1978).

Petitioners' mootness arguments are without substance, and can be intended only to "foster repetitive and time-consuming litigation," Craig v. Boren, 429 U.S. 190, 194 (1976), and to "postpone indefinitely relief which under the law may already be long overdue." Franks v. Bowman, 424 U.S. at 757 n. 9. As we show below, the parole board has been applying its unlawful release policies for the last six years, and the time has come to

correct the board's usurpation of judicial sentencing powers.

## II. THE MULTI-FACETED ILLEGALITY OF THE FEDERAL PAROLE GUIDELINES

Subsumed within questions three and four of the Petition for Writ of Certiorari is the central question of this case --did the court of appeals correctly reverse the district court's grant of summary judgment upholding the legality of the federal parole guidelines, both on their face and as applied, and remand the case for trial on respondent's detailed factual allegations concerning the genesis and application of those guidelines?[43]

The rules for reviewing summary judgment decisions are familar -- the Court must view the record in the light most favorable to respondent, the party who opposed the grant of summary judgment in the district court, United States v. Diebold, 369 U.S. 654, 655 (1962), and accept our version of the facts, Bishop v. Wood, 426 U.S. 341, 347 (1976), rather than the unfavorable factual

43 There is no dispute that the board's present guidelines, 44 Fed.Reg. 26542-48 (May 4, 1979) are, with differences not relevant to this case, the same guidelines applied to respondent in 1976, and the same guidelines originally promulgated by the board in 1972. See Pet.Br. 58.



representations offered by petitioners.[44]

Our challenge to the legality of the guidelines in the courts below started with those guidelines and a detailed explanation of how that "incredible table"[45] of "customary ranges of imprisonment," unrelated to the sentence actually imposed, was created. As we show below, those guidelines when first adopted in 1973 implemented a radical change in parole release decisionmaking, transforming the parole release decision into a second, unauthorized sentencing decision.[46] After

44 The decisions of the lower federal courts which have upheld the legality of the guidelines, e.g., Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978), are all based upon what we show below is a mistaken view of the genesis and application of the guidelines.

45 United States v. Norcombe, 375 F.Supp. 270, 274 n.3 (D.D.C. 1974).

46 We disagree with petitioners' assertion (Pet.Br. 57 n.50) that the origin of the guidelines is irrelevant hear. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 267-68 (1977). Our summary of the genesis of the guidelines shows that they were predicated upon a mistaken view of federal sentencing practices, an error which was later ignored by the board in its attempt to justify its guidelines. This background , of course, is germane to the question of whether Congress ratified the board's guidelines in the PCRA, and bears upon petitioners repeated and erroneous claim that the guideilnes are based upon parole release criteria adopted in the PCRA.

a brief analysis of the historical concept of the use of guidelines for parole release decisionmaking (infra at 53-56), we discuss the mechanical fashion in which the board applies its guidelines to resentence. (Infra at 57-62.) Then, we turn to the federal parole statutes, to demonstrate that the guidelines were unlawful when adopted (infra at 84-89), and that Congress refused to adopt the board's revolutionary change in parole philosophy in the 1976 PCRA. (Infra at 90-102.) In addition, a brief analysis of the constitutional problems which would be present if the PCRA was construed to authorize the present guidelines (infra at 102-105), dispels any doubts that the present guidelines are contrary to those intended by Congress. Finally, although the ex post facto issue — whether the parole policies authorized by the PCRA enhance the severity of sentences imposed for offenses committed prior to the effective date of the Act--need not be addressed if the board's present policies are unlawful, we demonstrate (infra at 111-116) that even if the guidelines are consistent with the PCRA, they nonetheless require that individuals serve more time in prison before being paroled than they would have in the past, and the guidelines are therefore a constitutionally impermissible ex post facto enhancement of punishment for persons like respondent, who are sentenced for wrongdoing committed prior to to the effective date of the PCRA.



## A. The Historical Concept of Parole Guidelines

There is nothing novel about the use of guidelines in parole release decisionmaking. Following scholarly debate about the feasibility of guidlines in 1923,[47] a set of guidelines was created and applied in the Illinois prison system. See Burgess, Factors Determining Success or Failure on Parole in Bruce, The Workings of the Indeterminate Sentence Law in Illinois (1928). The goal of these early guidelines was to aid the paroling authorities in predicting "parole prognosis," i.e., "to serve as a possible model for parole boards in determining which men to release on parole, and in obtaining some true conception of the probable length of parole supervision needed in different cases." Glueck & Glueck, 500 Criminal Careers 286 (1930).

Subsequent "explorations of methodological refinement" in parole guidelines, see Lejins, Parole Prediction —An Introductory Statement, 8 Crime & Delin. 209, 214 (1962), left unchanged the underlying philosophy of parole guidelines — "to increase the number of paroles granted to offenders who are likely to succeed on parole and correspondingly to reduce the number granted to those who are likely to fail." Ohlin, Selection for Parole 39

47 Warner, Factors Determining Parole from the Massachusetts Reformatory, 14 J.Crim.L. & Crim. 172 (1923); Hornell, Predicting Parole Success, 14 J.Crim.L. & Crim. 405 (1923).

(1951).[48] For many years, however, the actual use of parole guidelines was limited. Many parole boards were of the opinion that "no single device which social scientists may contrive can adequately supplant the mature and considered judgment of the parole board members." Ohlin, supra at 69.[49]

The social scientists who created the federal parole guidelines were aware of what they described as a problem of "research utilization," and addressed the problem of "how the product should be modified (or how it should be packaged) in order to meet the perceived needs of practicioners and be put to use." Hoffman, Gottfredson, Wilkins & Pasela, The Operational Use of an Experience Table, 1 (NCCD Supp. Rep. No. 7, 1973). The result was a "product" called the "matrix model" of guidelines.

The "matrix model" of parole guidelines is based on the assumption that a prisoner may be released on parole at any time within the discretion of the parole board,

48 See also Glaser, Prediction Tables as Accounting Devices for Judges and Parole Board, 8 Crime & Delinquency 239 (1962); Hussey, Perspectives on Parole Decision-Making with Juveniles, 13 Criminology 449, 455 (1976).

49 See also Evjen, Current Thinking on Parole Prediction Tables, 8 Crime & Delinquency 215 (1962); England, Some Dangers in Parole Prediction, 8 Crime & Delinquency 265 (1962); Hayner, Why Do Parole Boards Lag in the Use of Prediction Scores, 1 Pac. Soc. Rev. 72 (1958).



i.e., that there are no minimum sentences.[50] This assumption is in error as applied to federal prisoners, 77% of whom must serve one-third of their sentences before becoming eligible for parole.[51]

Notwithstanding the inapplicability of the "matrix model" to federal prisoners, it was successfully "packaged" on the erroneous claim -- repeated by petitioners in this Court (Pet.Br. 55-58, 88 n.77) -- that the matrix merely quantified the board's unregulated

50 As the creators of the guidelines mistakenly believed,

> [W]hen minimum sentences are short or are not given (as is presently a sentencing trend) parole selection is, in reality, more of a deferred sentencing decision (a decision of when to release) than a parole/no parole decision. Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 3 (NCCD Supp. Rep. No. 9, 1973),

51 In fiscal year 1974, 77% of all prisoners sentenced as adults received "regular adult sentences" and were therefore required to serve one-third of the actual sentence imposed before becoming eligible for parole. Administrative Office of the United States Courts, Federal Offenders in the United States District Courts-1974, App. X4 (92) (1978) (9,085 regular adult sentences, 2,498 indeterminate, and 285 mixed).

practices, i.e., that the matrix merely made explicit what had formerly been implicit in the way in which the board made decisions on a case by case basis in the past. Putting aside the fundamental problems inherent in the "descriptive approach" to the creation of guidelines,[52] the result of application of the matrix to federal parole policies was a revolutionary and unlawful change in the way in which the board made decisions.

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52 Descriptive guidelines are intended to make explicit the policies actually controlling discretionary decisions, and thereby insure that the same criteria will be applied in future decisions. The underlying assumption is that unregulated decisionmaking has produced a fair result in the average case, and that guidelines are required to minimize the number of cases in which something other than the "average" decision is made. See generally Gottfredson, Wilkins & Hoffman, Guidelines for Parole and Sentencing (1978). This assumption has been criticized as "untenable," Singer, In favor of "Presumptive Sentences" Set by a Sentencing Commission, 24 Crime & Delinquency 401, 418 (1978), and may well result in greater unfairness than unregulated decisionmaking. See Flaxman, Hidden Dangers of Sentencing Guidelines, 7 Hofstra L.Rev. 259 (1979).



**B. Application of the Guidelines**

Under the board's present practice, most prisoners receive a parole hearing within 120 days of the start of their term of imprisonment.[53] It is obvious that this parole hearing cannot be concerned with "[t]he behavior record of an inmate during confinement." Greenholtz v. Inmates, ___ U.S. ___, ___ (No. 78-201, May 29, 1979, slip op. 12.) Instead, this initial parole hearing involves, in effect, resentencing the prisoner in accordance with the "customary ranges of imprisonment" set in the board's guidelines.[54]

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53 28 C.F.R. §2.12(a) provides for an initial parole hearing within 120 days of incarceration, which for most prisoners will result in the setting of a "presumptive reease date (either by parole or by mandatory release)." 28 C.F.R. §2.12(c).

54 The concept of providing a prisoner with an early indication of when he (or she) will be paroled has been advanced as a device to enhance rehabilation and prison performance, by making the presumptive parole date conditioned upon institutional program participation and in-prison behavior. See Morris, The Future of Imprisonment 43-44 (1974) (discussing and criticizing systems of "contract parole").

The initial parole hearing, and the presumptive release date set by the federal parole board, however, are independent of prison performance.

The present federal parole guidelines, 44 Fed.Reg. 26543-47 (May 4, 1979) consist of a seven level "offense severity scale"[55] and a four level "salient factor scale."[56] These two scales are combined to form a

55 The original guidelines employed a six level severity scale. See 40 Fed.Reg. 41334 (1975). The present seven level scale was adopted in 1977 by dividing the "greatest" severity level into "Greatest I" and "Greatest II." 42 Fed.Reg. 52399 (1977).

56 The "salient factor score," while intended to be a measure of "parole prognosis," i.e., the likelihood that a prisoner will successfully complete a parole term, remains constant from the time of sentencing.

A prisoner's salient factor score can range from zero to eleven, and consists of points relating to prior convictions, prior incarcerations, age at first commitment, whether present offense involves auto theft or forgery or larceny, whether parole has been revoked, history of heroin or opiate dependence, and employment or full-time school attendance for at least six months during the last two years prior to incarceration. In the present guidelines, a maximum of one point may be awarded for four factors, two points for two factors, and three points for one factor. See 28 C.F.R. §2.20.

The salient factor scale is divided into four levels: scores of nine through eleven are "very good," scores of six through eight are "good," a score of four or five is "good," and scores of zero to three are "poor." Using the board's data, reported in

footnote continued



matrix of 28 "customary ranges of time to be served," which is the period of time that a prisoner with a particular "offense severity rating" and "salient factor score" must serve before he (or she) will ordinarily be paroled.[57] As petitioners admit (Pet.Br. 52n.41), the actual length of sentence is nowhere considered in the guidelines, and if a prisoner's sentence is too short to allow him (or her) to be in prison long enough to serve the "customary range of imprisonment" set by the guidelines, parole will ordinarily be denied, and the prisoner "continued to expiration," a fate which befalls 27% of all convicted defendants sentenced to terms of

Hoffman & Beck, Salient Factor Score Validation -- A 1972 Release Cohort 7 (U.S. Board of Parole Research Unit Rep. No. 8, 1975), the weighted average of the probability that a prisoner will perform satisfactorily upon release for each of the four salient factor scores ranges is as follows:

| Rating | Weighted Percent Favorable Outcome |
|---|---|
| very good (9-11) | 95.3% |
| good(6-8) | 83.7% |
| fair (4-5) | 69.5% |
| poor (0-3) | 57.0% |

57 The overwhelming number of parole release decisions are in accord with the "customary range of imprisonment" set in the guidelines. See note 6, supra.

imprisonment."[58]

The "customary range of imprisonment" of the guidelines bears little relationship to punishment actually imposed upon persons convicted of federal offenses. Approximately half of all persons convicted of federal offenses are sentenced to terms of probation.[59] For those defendants, of course, the "customary range of imprisonment" is zero. Slightly more than 25% of those defendants who are sentenced to terms of imprisonment receive sentences which are too short to allow them to serve the "customary range of imprisonment," and another 25% have lengthy sentences which do not allow them to become eligible for parole until after they have served their "customary range of imprisonment."[60]

A prisoner's "customary range of imprisonment" is primarily determined by his (or her) rating on the "offense severity scale," a ranking of federal offenses

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58 See note 7 supra.

59 See note 5 supra.

60 Id.



into severity levels ranging from "low" to "greatest II."[61] As the court of appeals noted (Pet.App. 52a n. 115), this arrangement of severity levels does not correspond to the maximum punishments authorized for various offenses by Congress. On the contrary, the "offense severity levels" are the board's attempt to fashion its own criminal code,[62] based upon a theory of "fixed price"

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61 The only contribution of the "salient factor scale" is to increase the "customary range of imprisonment" for a particular "offense severity level." For example, a prisoner with a "very good" salient factor score of 11 who committed a "very high severity" offense, will have a "customary range of imprisonment" of 24 to 36 months. Another prisoner, who had committed the same offense, and who may have received the same (or even a shorter) sentence, but whose salient factor score is "very poor" will have a "customary range of imprisonment" of 60 to 72 months. This will be true even if the offense of conviction carried a five year maximum sentence.

62 That slightly more than 26% of all prisoners are denied parole because the board has concluded that their sentences are too short, see note 7 supra, shows that it is not mere "hyperbole" (Pet.Br. 74 n.65) to characterize the guidelines as a "redrafting [of] the penalty provisions of the United States Criminal code." This is especially true when, as in some cases, parole is denied because the "customary range of imprisonment" set by the guidelines would require the prisoner to serve more time in prison than permissible under the maximum penalty authorized by Congress for the offense of conviction.

sentencing, i.e., "that each crime category be assigned a 'presumptive sentence' -- that is, a specific penalty based on the crime's characteristic seriousness." von Hirsch, Doing Justice 99 (1976).[63]

As the board explained at 44 Fed.Reg. 26548-50 (May 4, 1979) in connection with its addition of 28 C.F.R. §2.19(c), a prisoner's "offense severity rating" is determined by the board's de novo assessment of "total offense behavior." This may include uncharged offenses, Narvaiz v. Day, 444 F.Supp. 36 (W.D. Okla 1977), charges dismissed as part of a plea bargain, Bistram v. United States Board of Parole, 535 F.2d 329, 330 (5th Cir. 1976), or convictions reversed on grounds other than insufficiency of the evidence. United States v. Rubin, 591 F.2d 278, 281 (5th Cir. 1979).

The factors omitted from the board's definition of "total offense behavior" are "attribution judgments"[64] -- to what extent was this defendant responsible for this act, and to what extent does this act reflect a disposition to engage in crime -- judgments which could mitigate or aggravate the gravity of the offense in a particular case.

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63 See also Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (1976).

64 See, e.g., Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structures and Individual Differences, 39 Am.Soc.Rev. 224 (1974).



For example, a high ranking police officer who is involved in a conspiracy to commit extortion may be viewed as more culpable, and requiring greater punishment, than a patrolman who was involved in the same unlawful conspiracy. A district judge who had heard all of the facts and circumstances of the offense, and who has heard evidence in aggravation and mitigation of sentence, may well decide to impose disparate sentences in such a situation, as was done in the criminal case giving rise to respondent's conviction.[65] But to the parole board, in its peculiar view of "total offense behavior," each police officer would be viewed as having committed an offense of identical severity.[66]

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65 Respondent was one of nineteen former police officers convicted of involvement in a conspiracy to commit extortion; disparate sentences ranging from eighteen months to six years were imposed by the trial judge, and these intentional disparities were upheld on appeal. United States v/ Braasch, 505 F.2d 139, 152 (7th Cir. 1974). To the parole board, though, each of these defendants had committed an offense of the same severity, and each was considered for parole under the then applicable 26 to 36 months of the guidelines for prisoners who had committed an offense of "very high severity" and who had "very high" salient factor scores.

66 The same result would be achieved in a system of "fixed price" sentencing. See Von Hirsch, Doing Justice 100 (1976).

That the "offense severity scale" is viewed by the board as its own criminal code is illlustrated by the parole hearing of prospective additional respondent Harry Cardillo.[67] Cardillo was serving a four year prison sentence for a violation of 18 U.S.C. §371, and was mandatorily released under 18 U.S.C. §4164 after approximately 33 months of imprisonment. Under the guidelines, however, the "customary range of imprisonment" for Cardillo was 36 to 48 months, in excess of the the time he would serve before mandatory release, and a length of time which is seemingly contrary to the five year maximum penalty authorized by Congress for violations of 18 U.S.C. §371, and at odds with Cardillo's statutory eligibility for parole no later than after he served one-third of his sentence.

At his parole hearing, Cardillo argued that the "customary length of imprisonment" was excessive for his sentence and for his offense of conviction. (App. A1.) The board's hearing officers[68] acknowledged that the

67 The transcript of Cardillos' parole hearing is contained in the appendix to his pending Petition for Writ of Certiorari, Cardillo v. United States Parole Commission, No. 78-6620, and is reproduced in the addendum to this brief as Appendix A.

68 Since 1973, federal parole hearings have been conducted by hearing examiners. See 38 Fed.Reg. 23311 (1973) (order of the Attorney General authorizing the board to delegate decision-making authority to hearing examiners).



same "customary range of imprisonment" would apply if Cardillo had received a one year sentence (App. A2), and expressed the board's view that the "customary ranges of imprisonment" of the guidelines "are there to establish accountability" (App. A1), and that the only question at issue at the hearing was whether a decision should be made to "go below the guidelines." (App. A2.) Parole was denied because the examiners "can find no reason to depart from the guidelines." (App. A4.)

That the views of the sentencing judge are afforded little, if any weight, in the decision to "go below the guidelines" is shown by the circumstances surrounding the denials of parole to Eliezer Becher, who sought to intervene in the district court, and to David Gillis, a prospective additional respondent in this Court. Becher received a five year sentence upon his plea of guilty to a violation of 21 U.S.C. §960. (App., Ct. of App. A66.) Notwithstanding the attempt of the sentencing judge "to fulfill a moral obligation of [his] office"[69] by advising the board of his intent "that the defendant not serve more than one-third of the sentence," (App., Ct. of App. A70),

69 Becher v. United States, No. 77 Civ 2084 (HFW), S.D.N.Y. May 2, 1977 (filed as an exhibit to Becher's Application for Relief pending Final Disposition of Appeal in the court of appeals, denied on July 15, 1979).

Becher was denied parole because he had not served the "customary range of imprisonment" set for him by the guidelines." (Id. at A68.)

David Gillis initially received a five year sentence, and because of his cooperation with the government, was awarded a "presumptive release date"[70] to come after 24 months of imprisonment. Thereafter, the sentencing judge, acting on a timely motion under Rule 35 of the Federal Rules of Criminal Procedure, reduced Gillis' sentence to three years. Upon reconsideration, the board determined that "no change" should be made in the presumptive release date, thereby effectively negating the reduction in sentence -- Gillis will be paroled one month before he would be mandatorily released under his reduced sentence.[71]

As the Chairman of the board recently represented to the House Judiciary Committee, the board views itself as "a small collegial body, devoting full time to the specialized task of attempting to set fair and equitable prison terms within the statutes and the limits set by the

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70 See note 53 supra.

71 These facts are alleged in the Motion to Substitute, filed in this Court, and are supported by evidentiary material appended to the similar motion filed in the district court.



sentencing court."[72] In this Court, though petitioners contend (Pet.Br. 59) that the board's power to grant parole irrespective of the "customary ranges of imprisonment" set by the guidelines means that it is not attempting to resentence convicted felons. This is incorrect.

The power to grant parole outside of the guidelines is sparingly used. In fiscal year 1977, only 6.6% of all parole release decisions were below the guidelines. See note 6 supra. The board's own study of its decisions to depart from the guidelines shows that in only 9 out of 1080 cases was a decision made to grant or to deny parole irrespective of the guidlines because of factors relating to offense severity. Hoffman & DeGostin, Parole Decision-Making: Structuring Discretion 10-11 (U.S. Board of Parole Research Unit Rep. No. 5, 1974).

In addition, the board's internal practices are designed to minimize the number of decisions to depart from the guidelines. At the hearing held in the district court on remand before proceedings were stayed following the grant of certiorari, James C. Neagles, the board's

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72 Hearings on the Dept. of Justice Appropriation before the House Comm. on the Judiciary, Ser. No. 27, 95th Cong., 2d Sess., 101 (1978) (testimony of Cecil C. McCall, Chairman, United States Parole Commission).

chief hearing officer, revealed that the board maintains statistics on the number of cases in which each of its hearing examiners has voted to make a decision outside of the guidelines. The board periodically holds meetings with all of the hearing examiners to review these statistics, a practice which is plainly intended to minimize the number of decisions made to depart from the guidelines. For all of these reasons, the board's power to depart from the guidelines in a particular case is entitled to no more deference than the power to depart from discriminatory height requirements in Dothard v. Rawlinson, 433 U.S. 321, 331 n.13 (1977).

Petitioners seek to justify the board's refusal to consider length of sentence as a factor in the parole release decision because parole under the PCRA is to have "the practical effect of balancing differences in sentencing policies between judges and courts." H.Conf.Rep. 94-383, 94th Cong., 2d Sess. 19 (1976). (Pet.Br. 66-70.) Although based on an erroneous view of the PCRA, see Part II(c)Iii) below, petitioners' argument disregards the manner in which the present system of resentencing by the parole board came about -- through an attempt to apply Youth Correction Act release policies to adult prisoners.



## C. Creation of the Guidelines

### i. The YCA Study

The present federal parole guidelines are the product of a study of decisionmaking in Youth Correction Act,[73] cases conducted in 1971 and 1972 by the board in cooperation with the National Council on Crime and Delinquency.[74] See Hoffman, Paroling Policy Feedback, 7-8 (NCCD Supp.Rep. No. 8, 1973).[75] YCA commitments

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73 18 U.S.C. §§5005-5026.

74 As the former chairman of the parole board has stated, the guidelines were developed "by the National Couincil on Crime and Delinquency in cooperation with the U.S. Board of Parole. The project was codirected by Dr. Don M. Gottfredson, Director, Research Center, National Council on Crime and Delinquency, in Davis, California. His codirector was Professor Leslie Wilkins of the State University of New York in Albany." Reed, Parole vs. The Determinate Sentence in the Administration of Criminal Justice, 1975 Proceedings of the Congress of Correction of the American Correctional Association 259, 263 (1975)

75 In its "Return and Answer" (App. 25), petitioners admitted the allegation of paragraph 30 of the complaint (App. 11), that Hoffman, supra, is one of the reports describing the creation of the guidelines.

are purely indeterminate -- the YCA prisoner may be released at any time within the discretion of the board -- and it is for that reason that length of sentence was not considered in the YCA study. Id. at 10.

The YCA study was intended to test the hypothesis that decisions in YCA cases were based on four factors -- offense severity, parole prognosis, institutional program participation, and institutional discipline. Hoffman, supra at 12.[76] The study consisted of asking members of the Youth Corrections Division of the board to complete forms rating these four factors in a total of 340 YCA cases heard from November 1, 1971 to May 30, 1972. Id. at 7. The results from 275 of these cases, id. at 8 n.6, were then tabulated and analyzed. Id. at 12-16.

The conclusion of the YCA study was that the ratings of institutional program participation and institutional discipline were insignificant factors in decisionmaking. Hoffman, supra at 16. The most significant factor in determining how long a YCA

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76 These factors were chosen after "[i]nformal interviews with parole board members and hearing examiners," Hoffman, supra at 5, and were intended "to reflect four important prevalent parole selection concerns cited by [two commentators]." Id. at 10. These factors, though, were chosen without regard to the rehabilitative purpose of YCA commitments.



prisoner would remain incarcerated was found to be the rating of offense severity, followed by the rating of parole prognosis. Id. From these findings, the board's researchers concluded that the majority of YCA release decisions could be predicted on the basis of the severity of the prisoner's offense and upon a judgment of the likelihood that, if paroled, the prisoner could successfully complete a parole term. Id. at 14.

There were obvious methodological problems with this study -- no attempt was made to determine if the study itself had affected decisionmaking,[77] only a small number of cases were involved, and the subjective scales used were relatively crude.[78] Notwithstanding these problems, the board decided to base its prospective decisionmaking -- not only in YCA cases, but in cases dealing with adult offenders -- on the results of the study. This was a radical shift in the focus of the study, which had been intended merely to allow "parole board

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77 See Aronson & Carlsmith, Experimentation in Social Psychology 61-70, in Lindzey & Aronson, II The Handbook of Social Psychology (1968).

78 Based upon information we have obtained through the Freedom of Information Act from the Law Enforcement Assistance Administration, which provided the funds for the NCCD study creating the guidelines, we believe that the evidence will show that these were the criticisms of the NCCD study by an outside reviewer.

members to examine the congruence of actual [YCA policy] with desired [YCA] policy on a macroscopic level." Hoffman, supra at 26. Thus, the modest goal of the study was to allow the board to determine if its YCA policies were consistent with those authorized by Congress. If this had been done, it is apparent that the board would have realized that its YCA policies were unlawful.[79] Instead, the board decided that the policies revealed in the YCA study should be reified into a set of guidelines for adult as well as for youthful offenders. Hoffman, supra at 27.

Petitioners do not deny that the board's current guidelines for adult offenders are based upon the board's former YCA policies (Pet.Br. 57 n. 50), but assert that it

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79 The central purpose of the YCA is that "execution of the sentence is to fit the person, not the crime for which he was convicted." Dorszynski v. United States, 418 U.S. 424, 434 (1974). For this reason, a number of courts have held the board's guidelines to be unlawful as applied to YCA prisoners. See, e.g, United States ex rel. Mayer v. Sigler, 403 F.Supp. 1243 (M.D.Pa. 1975), aff'd without published opinion, 556 F.2d 570 (3d Cir. 1977); Fletcher v. Levi, 425 F.Supp. 918 (D.D.C 1976); DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978); Duldulao v. United States Parole Commission, 461 F.Supp. 1138 (D.Fla. 1978). As one district judge recently concluded, the board "has refused to accept and implement the fundamental philosophical concept of the YCA." Watts v. Hadden, Warden, 469 F.Supp. 223, 230 (D.Colo. 1979).



was appropriate for the board to establish its release policies in adult cases by studying how it made decisions in YCA cases. Id. There is no logic in this assertion. Aside from the Congressional mandate that commitment under the YCA is for rehabilitation, Dorszynski v. United States, 418 U.S. 424, 434 (1974), there is a vast difference between release decisions in YCA cases and release decisions in cases involving adult offenders. Unlike a YCA offender, who is eligible for release immediately upon imprisonment, 18 U.S.C. §5017(a), and will generally be confined for an indeterminate period of up to six years, 18 U.S.C. §5017(c), adult offenders may receive any sentence up to the maximum authorized by statute, * and approximately three-quarters of all adult offenders must serve one-third of their sentence before becoming eligible for parole.[80]

Had the board studied its policies in cases involving adult prisoners before adopting what it claims here (Pet.Br. 57-58) were intended to be "descriptive guidelines," see note 52 supra, it is obvious that a well designed study would have shown that length of sentence and percentage of total served were controlling factors

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* See, e.g., Blockburger v. United States, 284 U.S. 299 (1932); Townsend v. Burke, 334 U.S. 736 (1948); Gore v. United States, 357 U.S. 386 (1958); United States v. Grayson, 438 U.S. 41 (1978).

80 See note 51 supra.

in the parole release decision. This is precisely the finding of an independent researcher, who studied the board's decisions, using the board's pre-1973 data, and found that the factors most predictive of actual decisionmaking were time served, length of sentence, and custody classification at the time of the parole hearing. Schmidt, Demystifying Parole 62 (1976).

Application of the board's YCA policies to adult offenders produces anomalous results. It is, of course, impossible that the board was releasing adult prisoners before they became eligible for parole, or that the board was granting parole after the prisoner had fully served the sentence imposed by the district judge. This, however, is precisely what is "predicted" by the YCA policies as applied to adult prisoners. The YCA policies "predict" that 25% of all prisoners will be paroled only after they have been mandatorily released, and that another 25% will be paroled before they even become eligible for parole.[81]

The obvious irrelevance of the board's YCA experience to parole decisions for adult prisoners -- who are sentenced by a judge and who must serve a substantial portion of their sentence before becoming eligible for parole -- was apparent to state parole boards when the same researchers who had created the federal

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81 See note 7 supra.



parole guidelines attempted to "package" those guidelines for use by state systems. In North Carolina, where -- as with adult prisoners in the federal system -- most prisoners must serve a significant portion of their sentence before becoming eligible for parole, the state parole board refused to adopt the federal YCA guideline model, concluding that it was not their responsibility to "resentence the inmate." Gottfredson, Cosgrove, Wilkins, Wallerstein & Rauh, Classification for Parole Decision Policy 38 (1978). For the same reasons, the YCA policy model was rejected by the parole boards in Virginia, Louisiana, and Missouri. Id. at 31.[82]

In this Court, the board seeks to argue (Pet.Br. 63-70) that Congress ratified the YCA model of parole release decisionmaking for adult prisoners in the PCRA. But before responding to petitioners' erroneous construction of the PCRA, we briefly discuss the new parole release policies created by the manner in which the subjective measures of offense severity and parole prognosis of the YCA study were transformed into the "offense severity scale" and "salient factor scale" of the present guidelines.

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82 Guidelines created for those jurisdictions are "sequential models," which attempt to isolate each of the judgments made in the parole release decision, and insure that decisions are made rationally. See Gottfredson, et al., supra at 277.

### ii. Mechanical Measures

As we have shown above, the results of the YCA study were poorly suited for application to prisoners serving regular adult sentences. But even if the board could lawfully have applied its YCA policies to adult offenders, the rating of the severity of a prospective parolee's offense and the subjective judgment of his or her parole prognosis made in the YCA study bear no relation to the "offense severity" and "salient factor" scales of the present guidelines. Instead, the mechanical measures created for offense severity and parole prognosis resulted in the creation of new parole release policies, which had not been derived from the YCA study, and which have not been authorized by Congress.

The judgment of offense severity made by the board members participating in the YCA study was analogous to the decision of a judge in imposing sentence. Just as a judge has the discretion to impose any sentence within statutory limits, the board members involved in the YCA study were free to assign whatever severity rating they deemed appropriate, regardless of



the type of offense involved.[83] Similarly, the rating of parole prognosis used in the YCA study was an ad hoc decision based on the facts and circumstances of each case -- what is the likelihood that this prisoner, released at this time, will be able to successfully complete a parole term?[84]

The board's researchers recognized that these subjective measures "may reflect rationalizations for decisions rather than determinants of them." Hoffman, supra at 11. But rather than inquire further and determine what factors were actually material to decisionmaking in adult cases, the board's researchers --

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83 At the conclusion of each YCA hearing in the study, the board members were asked to circle one of six descriptions of offense severity, ranging from "among the least serious offenses" to "among the most serious offenses." Hoffman, supra at 28. The only direction for determining the severity rating was to "circle the letter which most clearly corresponds to your evaluation of the severity of the offense behavior for which this subject was committed." Id.

84 The rating of parole prognosis was made at the end of each hearing by circling, on a scale ranging from zero to 100, in increments of 10, the probability of a favorable parole outcome. Hoffman, supra at 29.

apparently because of budgetary limitations[85]--disregarded the objections of their "Scientific Advisory Board,"[86] and accepted without objection the request of the board "to develop parole selection policy guidelines in as objective a format as possible." Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 8 (NCCD Supp.Rep. No. 9, 1973).[86] The resulting "objective measures" bear no relation to the judgments of offense severity and parole prognosis made in the YCA study.

As the court of appeals observed (Pet.App. 34a), petitioners have admitted that the "objective measure" of offense severity created for the guidelines was obtained by distributing sets of index cards, each card containing the name of an offense, to members of the board, who were asked to sort the cards into six piles of

85 Based upon FOIA materials, see note 78 supra, we believe that the evidence will show that the board's researchers sought additional funds from the LEAA to analyze the applicability of the YCA policy to adult cases, but that the LEAA refused to grant additional funds, being of the view that such a project should be supported by the board.

86 The board's researchers periodically consulted with a "Scientific Advisory Board." Based on the FOIA materials, see note 78 supra, we believe that the evidence will show that the "Scientific Advisory Board" opposed as methodologically unsound application of the YCA policies to adult prisoners.



varying severity levels. While this sorting of index cards may have been useful to ascertain the board's consensus about the severity of the 51 offense descriptions involved in the exercise, it sheds no light upon the multiple factors which had been considered in the ad hoc judgment of offense severity made in the YCA study.[87]

The "objective measure" of parole prognosis created for the guidelines is even less related to the rehabilitative judgment made in the YCA study, where a decision to deny release because of poor parole prognosis could have been based on the belief that additional incarceration was required before the prisoner would be

87 In the opinion of Professor Levy, whose affidavit was offered by respondent in the district court (App., Ct. of App. A23-A28), there would be two major consequences from the change in rating the severity of an individual offense, as in the YCA study, to rating the severity of a category of offense, as in the offense severity scale:

> First, it is likely that severity judgments for categories of offenses will be more likely to reflect ideological attitudes towards the offense than would ratings based on actual knowledge about a particular offense. Such a procedure would tend to reproduce the raters stereotypes towards the various offenses, instead of a reasoned judgment about the offender's behavior. Secondly, the present method of assessment of offense severity underestimates the importance of the offender's actual behavior, by disregarding this factor from the rating of the severity of the offense. Id. at A27-A28.

rehabilitated.[88] In contrast with the subjective judgment in the YCA study of whether, after a given amount of imprisonment, a particular prisoner has been rehabiliitated, a prisoner's salient factor score is constant, regardless of whether a prisoner has been confined for one day or for twenty years.

The salient factor scale was created from an analysis of the impact of sixty-six factors upon the post-release behavior of federal prisoners who had been discharged from custody during the first six months of 1970. Gottfredson, Wilkins & Hoffman, Guidelines for Parole and Sentencing 41 (1978). In determining which factors to count, the researchers apparently concluded that success following release from prison could not be affected by anything that occurred during imprisonment, and those factors -- such as institutional behavior, program participation, and case worker recommendations -- were totally omitted from the factors considered. It was therefore inevitable that the salient factor scale does not include any measures of in-prison performance, and is unaffected by how long a prisoner has been incarcerated, and his (or her) success in prison.

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88 This, of course, would have been consistent with the "treatment" rationale of the YCA. See note 79 supra..



While petitioners claim that institutional performance "may justify a decision outside of the guidelines" (Pet.Br. 59), the board's statistics indicate that in only 17 out of 1080 cases is a decision made to parole below the guidelines because of "outstanding institutional progress." Hoffman & DeGostin, Parole Decision-Making: Structuring Discretion 11 (U.S. Board of Parole Research Unit Report Five, 1974). As the board's Guideline Application Manual makes plain, a departure from the guidelines because of program achievement "is clearly exceptional." Id. at 4.17.

Once the board's researchers had created the offense severity scale and the salient factor scale, the next step was to define the "customary ranges of imprisonment" of the guidelines. The actual sentences which had been imposed "deliberately were not taken into account."[89] Instead, the board's researchers calculated the median length of time which had been served in prior years for each cell of the matrix. Hoffman & Gottfredson, Paroline Policy Guidelines: A Matter of Equity 10 (NCCD Parole Decisionmaking Project Supp.Rep. No. 9, 1973). A concededly arbitrary

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89 Hearings on Dept. of Justice Authorization before the House Judiciary Comm., Ser. No. 27, 95th Cong., 2d Sess., 122 (1978) (testimony of Peter Hoffman, Director of Research, United States Parole Commission).

"discretion range" was then added to the median to obtain the range of total time, as in the present guidelines. Id.

The result of this process was, as the board's researchers admitted, the creation of a new "prospective policy" for parole release decisionmaking. Hoffman & Beck, Application of a Severity Scale 27 (NCCD Supp.Rep. No. 13, 1973), in which parole boards would "act as sentencing review bodies" to determine "the time convicted offenders should serve in prison." Wilkins, Additional Views, in Von Hirsch, Doing Justice 178-79 (1976). While the board's researchers believed this "revolutionary philosophy," id., was lawful because "parole selection is, in reality, more of a deferred sentencing decision (a decision of when to release) than a parole/no parole decision," Hoffman & Gottfredson, supra, at 3, this view of federal parole law was incorrect in 1973, and remains erroneous today, following enactment of the PCRA.



**D. The Illegality of the Guidelines**

Three revolutionary policy changes are implemented by the federal paroleguidelines: First, rehabilitation is no longer considered in the parole release decision.[90] Second, offense severity is mechanically rated de novo by the board, without regard to the facts of the particular case and irrespective of the actual sentence imposed, or the maximum sentence which could have been imposed.[91] Third, a prisoner can do nothing once he is incarcerated to improve his chances for parole. Congress, however, has not authorized any of these revolutionary changes.

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90 As we have shown above, rehabilitation is not a factor in the guidelines because the board's researchers simply decided not to include any factors bearing on rehabilitation when they created the salient factor score.

91 The board has attempted to justify this policy as being essential to "the primary benefit of the Board's guidelines, which is to reduce sentence disparity." 40 Fed.Reg. 41328, 41330 (1975). Reduction of sentence disparity, though, was not a consideration in the YCA study, where all sentences are pure indeterminate, and, as we have shown above, reduction of sentence disparity is at best an after the fact rationalization for the guidelines "packaged" for the board.

### i. Pre-PCRA Law

Rehabilitation, the facts and circumstances of the particular crime, the actual sentence, and the behavior record of an inmate during confinement have all been part of the federal parole law since Congress enacted the first federal parole statute in the Act of June 25, 1910, ch. 387, §1, 36 Stat. 319.

Parole was at that time a recent innovation, and was a product of the prison reform movement of the late nineteenth century, and the belief that "reformation is the primary object to be aimed at in the administration of penal justice."[92] The first modern parole statute had been adopted in New York in 1876, and was limited in application to a reformatory for youthful offenders.[93] The New York statute, N.Y. Laws 1877,

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92 Wines, Prison Reform 13 (1910), quoted in LaRoe, Parole with Honor 55 (1939). See also Lindsey, Historical Sketch of the Indeterminate Sentence and Parole System, 16 J.Crim. & Crim. 9, 10-18 (1925); 4 Attorney General's Survey of Release Procedures 16-19 (1939).

93 "The year 1876 marked the beginning of parole in America, inasmuch as, for the first time in this country, parole was used at Elmira in a manner comparable to present day parole administration." 4 Attorney General's Survey of Release Procedures 19 (1939).



ch.424, viewed parole 'as the culmination of the course of varied institutional training programs, whereby the inmate's capacity and willingness to reform could be tested by serving a part of the sentence in the community on parole."[94] In pertinent part, the statute provided that a prisoner could be paroled if

> there is a strong and reasonable probability that any prisoner will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society.

Virtually identical language was used by Congress in the 1910 parole act, which authorized the release of a prisoner on parole if

> there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society. 36 Stat. 319 (1910).

That rehabilitation and the behavior record of an inmate during confinement were viewed in the 1910 Act as the primary focii of the parole release decision is

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94 Reed, Parole vs. TheIndeterminate Sentence in the Administration of Criminal Justice, 1975 Proceedings of the Congress of Correction of the American Correctional Association 259, 260.

reflected in the decision of Congress to make parole available only to prisoners who were serving a sentence of one year or more, and who had served one-third of their sentence. As the then Superintendent of Federal Prisons and Prisoners testified before the House Judiciary Committee, "reformation is built up step by step, evidenced by certain marks and credits in the institution in which the prisoner is confined," and "it is not thought that a man could show that he had become reformed within that short period of time [if parole was made available to prisoners serving sentences less than one year]." Hearings on S.870 and H.R. 23016 before Subcomm. of the Comm. on the Judiciary, 61st Cong., 2nd Sess. 5, 8 (1910).

Rehabilitative considerations were again considered by Congress in 1913 when it extended parole to prisoners serving life sentences.[95] Act of January 23, 1913, 37 Stat. 650 (1913). Fifteen years later, the state of the law was aptly summarized by this Court in United

95 Making parole available to a prisoner serving a live sentence was viewed as a mechanism to replace executive clemency for prisoners "whose record prior to conviction was not vicious, and who while in prison have never been reported for any violation of the prison rules." H.Rep. 371, 62nd Cong., 2d Sess., 2 (1912), quoting from the 1911 annual report of the board of parole.



States v. Murray, 275 U.S. 347 (1928), when it wrote that parole is determined by "the conduct of penitentiary convicts during their incarceration." Id. at 357.

The first substantive change in the parole release decision between 1910 and 1976[96] occurred in 1951 when -- continuing to reflect its view that parole was linked to rehabilitation, prison behavior, and the length of sentence -- Congress made parole available to prisoners serving sentences in excess of one-hundred and eighty days. 65 Stat. 277 (1951). In contrast with the one year minimum sentence which had been set in the 1910 Act, the 1951 amendment reflected the judgment of Congress that two months of incarceration (one third of one hundred and eighty days) would be sufficient "before the authorities can determine the degree of rehabilitation that would warrant the parole of a prisoner." S.Rep. 525,

96 In 1930, the original board -- which had consisted of the superintendent of prisons and the warden and physician of each prison -- was replaced by what was intended to be an "independent parole board" to be appointed by the Attorney General. 46 Stat. 272 (1930.) See H.Rep. 104, 71st Cong., 1 (1930). Problems apparently developed with the independence of the board, see Goldfard & Singer, After Conviction 170 (1973) (reporting that the attorney general and the board had yielded to presssure to release former members of the "Capone gang" after they had served their minimum sentences), and in 1950 Congress required that members of the board be appointed by the President, and approved by the Senate. 64 Stat. 1085 (1950).

82nd Cong., 1st Sess., 2 (1951).

In 1958, Congress brought indeterminate sentencing to federal criminal law, 72 Stat. 845-46 (1958), and allowed a district judge to impose a sentence making a prisoner eligible for parole immediately upon imprisonment, or at any time before the prisoner had served one-third of his or her sentence. Indeterminate sentencing was viewed as a rehabilitative tool -- the 1958 Act was intended "to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community." Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974).[97]

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97 See also United States v. Salerno, 538 F.2d 1005, 1008 (3d Cir. 1976) (Act "was intended to give district judges a mechanism to adjust the length of a defendant's sentence to his progress in rehabilitation programs and his attitude towards a return to society.")

The claim that the Act was primarily intended to allow the board to correct sentence disparity, advanced by the board in other litigation, see Brief of Petitioner, United States v. Addonizio, O.T. 1978, No. 78-156, 57-58, was correctly rejected by Judge Tone in Garafola, supra: "As for [sentence] disparity, however, Congress must have recognized that [indeterminate sentencing] would have only a modest impact, since its use is optional with the judge and judges who tend to give severe sentences are not the ones most likely to make frequent use of [indeterminate sentencing]." 505 F.2d at 1217.



Federal parole law remained unchanged at the time the guidelines were adopted by the board in 1973. Although the board started to use hearing examiners in 1973, see 38 Fed.Reg. 23311 (1973), the criteria for granting parole had remained virtually unchanged from the seminal New York statute of 1877; in 1973, 18 U.S.C. §4203(a) (1970) provided the following parole release criteria:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reaonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole. (emphasis supplied)

This was the statute in effect at the time the parole guidelines were first adopted. It is plain that the policies implemented in the guidelines, see ante at 83, are contrary to the parole criteria of the 1970 statute, with its emphasis upon rehabilitation. In 1976, though, Congress enacted a new parole statute, 90 Stat. 219-33, and the board argues that its guidelines, which were repromulgated without any substantial changes under the PCRA, 41 Fed.Reg. 19326 (1976), are consistent with the Act. (Pet.Br. 60-74.) Although we believe that the

illegality of the board's guidelines may be determined solely from the language of the PCRA, we first turn to the legislative history of the Act to show that it would be truly absurd for the PCRA to be construed in the manner urged by petitioners. See TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

### ii. The PCRA

The PCRA originated as H.R. 5727,[98] and resulted from "an extensive nationwide review of the problems of

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98 The PCRA was reported from the House Judiciary Committee on May 11, 1975, as HR 5727, accompanied by H.Rep. 94-184, 94th Cong., 1st Sess. (1975). 121 Cong.Rec. 12821 (1975). The bill was considered and passed by the House on May 21, 1975. 121 Cong. Rec. 15716.

The Senate Judiciary Committee reported an amended version of HR 5727 on September 11, 1975, accompanied by S.Rep. 94-184, 94th Cong., 2d Sess. (1976). 121 Cong.Rec. 28615 (1976).

A House-Senate conference committee reported a compromise bill on February 23, 1976 (house) and February 24, 1976 (senate). 122 Cong.Rec. 4063,. 4145. The amended bill passed the Senate on March 2, 1976, 122 Cong.Rec. 4862 and the House on March 3, 1976. 122 Cong.Rec. 5165.



the penal system." H.Rep. 94-184, 94th Cong., 1st Sess. 2 (1975). The House Judiciary Committee was skeptical of the board's guidelines; as its counsel stated at the committee hearings:

> . . . the problem is that once you fall into the trap of accepting any of the Board's justifications for what it does, such as relieving sentence disparity, you sort of have lost the game. This is because they have surrealistic justifications for what they do, and reality compels cutting through whatever they claim they need and looking at the system as a whole. Hearings on H.R. 1598 and Identical Bills before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. 182 (1973).

The bill which emerged from the House Judiciary Committee required that a federal prisoner with good institutional behavior was to be released after completion of one-third of his sentence, unless the board affirmatively found release to be undesirable under the statutory criteria. See H.Rep. 94-184, supra at 5. Guidelines were contemplated by the House bill "with respect to the factors to be taken into account in determining whether or not a prisoner should be released on parole." (§4202(a)(1) (House version). The floor debate made clear that the Houes was opposed to the type of guidelines then in use by the board, and that something

less mechanical was intended.[99]

The House bill endorsed rehabilitation as a goal of imprisonment -- section 4208(e) required that if parole was denied, "the examining panel shall advise the prisoner as to what steps, in its opinion, may be taken to correct the problems responsible for the denial of release on parole, so as to enhance the chance of being released." As explained by Representative Drinan, this section meant that "[t]he rehabilitative process is further underscored." 121 Cong.Rec. 15705 (1975).

A new power to alleviate sentence disparity and to reward rehabilitation was created in the House bill. Section 4205(c) would have vested the sentencing court with jurisdiction to act on a motion by the Director of the Bureau of Prisons to modify a prisoner's sentence and make the prisoner immediately eligible for parole if the Director was of the opinion that "by reason of [a prisoner's] training and response to the programs of the Bureau of Prisons . . . there is a reasonable probability that the prisoner will live and remain at liberty without

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99 See the remarks of Rep. Drinan at 121 Cong.Rec. 15703 ("the committee clearly expressed its objection to a checklist or prototype denial statement"); remarks of Rep. Guid, id. at 15710 (bill would produce "far greater scrutiny and understanding of each prisoner's record, both before and during incarceration").



violating any criminal law, that his immediate release is not incompatible with the welfare of society, and that his release would not so deprecate the seriousness of his crime as to undermine respect for law." Id. In addition, the House bill would have made permanent the board's 1974 administrative reorganization into various regions. H.Rep. 94-184, supra at 2.

Substantial changes were made to the House bill by the Senate, which worked closely with the board, S.Rep. 94-369, 94th Cong., 2d Sess. 19 (1976), in preparing a bill which would have ratified the board's existing guidelines. Id. at 18, 25. The Senate bill rejected the presumption of parole contained in the House bill, and would have authorized the board to apply "the standards and criteria [for parole release] . . . without regard to which of the three main sentencing alternatives [regular adult sentence, pure indeterminate sentence under 18 U.S.C. §4208(a)(2) (1970), or a mixed indeterminate sentence under 18 U.S.C. §4208(a)(1) (1970)] is utilized by the court." Id. This, of course, was precisely what the board was doing when it applied its guidelines without regard to the length or type of sentence which had been imposed.

As viewed in the Senate bill, parole was "an extension of the sentencing process." S.Rep. 94-369, supra at 15. And one of the purposes of parole was defined as requiring that "offenders sentenced for similar crimes under similar circumstances will be required to serve comparable periods of incarceration." Id. at 19.

The bill subsequently enacted (the "PCRA"), resulted from what was described by Representative Kastenmeier, one of the sponsors of the House billl, as "considerable compromise on the part of the conferees on both sides." 122 Cong.Rec. 5163 (1976). The presumption of parole at the one-third point was eliminated, and the Senate's characterization of parole as an "extension of the sentencing process" was deleted from the conference report, which, as the court of appeals observed (Pet.App. 42a), contained a statement of purposes otherwise identical to the Senate version. See H.Conf.Rep. 94-383, 94th Cong., 2d Sess. 19-20 (1976). Rather than having the purpose of eliminating sentence disparities, as in the Senate bill, the conference committee described the PCRA as "having the practical effect of balancing differences in sentencing policies between judges and courts." Id. at 19. (emphasis supplied)

As did the House bill, the PCRA made permanent "the legality of changes implemented by administrative reorganization." Conference Rep., supra at 20[100] The

100 Petitioners argue here, as they did in the court of appeals (Pet.App. 43a n.91) that by making permanent the board's 1974 administrative reorganization, the PCRA ratified the board's guidelines. (Pet.Br. 66.) This is a tenuous basis upon which to conclude that Congress was approving the board's radical revision of parole decisionmaking, especially when the language relied upon by petitioners is derived from the House bill which, as petitioners do not deny, would have rejected the existing guidelines.



provision of the Senate bill that indeterminate sentences would be treated as regular adult sentences was omitted from the PCRA.[101]

The major differences between the House and Senate, described by Representative Kastenmeier as revolving about the "question of how much discretion should be retained by the Commission in making parole release determinations once a prisoner is in fact eligible for parole," 122 Cong.Rec. 5163 (1976), was "resolved by increasing the role of parole determination guidelines and by granting the Commission the option of acting outside the guidelines in extraordinary cases." Id. But the conference report carefully avoided ratifying the board's existing guidelines:

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101 The PCRA amended the Youth Corections Act, 18 U.S.C. §5017(a), and the Juvenile Justice Act, 18 U.S.C. §5041, "to provide for parallel parole release criteria for all eligible prisoners." Conference Report, supra at 36, 37. Although this provision has been read as repealing the rehabilitative focus of the YCA, DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978), we believe that the correct view is that expressed in Watts v. Hadden, Warden, 469 F.Supp. 223, 233 (D. Colo. 1979), that the ameliorative policies of the YCA (and the JJA) were not repealed by the PCRA.

> It is the intent of the Conferees that the guidelines serve as a national parole policy which seeks to achieve both equity between individual cases and a uniform measure of justice. The Parole Commission shall actively seek the counsel and comment of the corrections and criminal justice communities prior to promulgation of guidelines and shall be cognizant of past criticism of parole decision-making. Conference Report, supra at 26.

The parole release policies contemplated by the PCRA are multi-faceted. The board is required to consider three factors: (1) Whether the prisoner has "substantially observed the rules of the institution or institutions to which he has been confined"; (2) "the nature and circumstances of the offense", and (3) "the history and characteristics of the prisoner." 18 U.S.C. §4206(a) (1976). Based on these three factors, and pursuant to guidelines, the board is to determine "that release would not depreciate the seriousness of [the prisoner's] offense or promote disrespect for law" and "would not jeopardize the public welfare" in making release decisions. Id. Rehabilitation is explicitly maintained as a concern for the board -- the PCRA viewed parole as "providing a means for prisoners to achieve credit for good behavior and shorten their time in prison." 122 Cong.Rec. 4862 (1976) (remarks of Sen. Hruska.) This view is reflected by the adoption in the PCRA of the provision of the House bill that if parole is denied, the prisoner shall be advised, when feasible, "as



to what steps may be taken to enhance his chance of being released at a subsequent proceeding. 18 U.S.C. §4207(g) (1976).

The Conference Report explains the parole release criteria of the PCRA as follows:

> First, it is the intent of the Conferees that the Parole Commission reach a judgment on the institutional behavior of each prospective parolee. It is the view of the Conferees that understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons.
>
> Second, it is the intent of the Conferees that the Parole Commission review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner. It is the view of the Conferees that these two items are most significant in making equitable release determinations and are a viable basis, when considered together, for making other judgments required by this section. Conference Report, supra at 26.

As the court of appeals concluded (Pet.App. 43a), the conferees were of the view that in each case, the parole decision makers

> must weigh the concepts of general and special deterrence, retribution and punishment, all of which are matters of judgment . . . and come up with determinations of what is meant by "would depreciate the seriousness of the offense or promote disrespect for the law" that, to the extent possible, are not inconsistent with findings of other parole decisions. Conference Report, supra at 26.

It is this statutory scheme which petitioners contend authorizes the present form of federal parole guidelines. (Pet.Br. 60-74.) We disagree. The guidelines were unlawful when adopted, and continued to be unlawful under the PCRA.

### iii. The Guidelines Are Contrary to the PCRA

There are five important divergencies between the policies implemented in the guidelines and the policies authorized by Congress in the PCRA:

First, Congress intended that the "conduct of penitentiary convicts during their incarceration," United States v. Murray, supra, 275 U.S. at 357, continue to be considered in the parole release decision. Conference Report, supra at 25. Parole release decisions under the guidelines, though, do not weigh any factors relating to institutional behavior, aside from the "general note" that applicability of the guidelines "is predicated upon good institutional conduct and program performance." See 44 Fed.Reg. 26546 (May 4, 1979). The de minimus role of institutional performance in the board's release policies is shown by the small number of cases (17 out of 1080) in which a decision is made to grant parole irrespective of the guidelines because of instituitional behavior, see ante at 81 While the board may have rationalized its decision



to refuse to consider rehabilitative concerns in parole release decisions because "anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago," Greenholtz v. Inmates, supra, slip op. 11, this does not mean that the board may lawfully refuse to consider rehabilitative factors in parole release decisions. This is especially true when, in its report accompanying S. 1437, the proposed revision of the federal criminal code, the Senate Judiciary Committee emphasized that rehabilitation is to remain as a goal of imprisonment. S.Rep. 95-605, 95th Cong., 1st Sess. 891 (1976).

Second, Congress intended that parole release decisions be based "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner." 18 U.S.C. §4206(a) (1976). The offense severity scale of the guidelines, however, disregards the gravity of the offense in a particular case in favor of a categorization of "offense behaviors." This categorization ignores the factors which would make a given criminal act more or less serious. As we have shown above, the result is that under the guidelines the severity of a prisoner's offense is determined by the type of offense which had been committed, rather than upon the specific criminal act involved. As the court of appeals concluded (Pet.App. 45a), "[s]uch a process seems significantly different from the contemplation of

the conferees that in structuring 'each parole determination [the Commission] shall make a determination as to the relative severity of the prospective parolee's offense.'" (quoting Conference Report, supra at 26) (emphasis added by the court of appeals).

Third, as petitioners admit (Pet. Br.52 n.41) the guidelines refuse to give any weight to the actual sentence imposed. The PCRA, however, does not authorize the board to, in effect, resentence adult prisoners; on the contrary, the PCRA requires the board to be "joined in purpose" with the courts. Conference Report, supra at 26. It is impossible to understand how this may be done if, in making its judgments about the severity of a prospective parolee's offense, the board categorically refuses to consider the sentencing judge's assessment of offense severity, as reflected in the actual sentence imposed.

Fourth, the guidelines do not conform to the requirement of 18 U.S.C. §4206(a)(1976) that parole decisions consider whether release "would not jeopardize the public welfare." Because of the factors which were selected for analysis in the computation of the "salient factor table," a prisoner's "parole prognosis" is the same after one day of imprisonment as it will be after twenty years of incarceration, regardless of institutional program participation or institutional behavior. Such a



measure of "parole prognosis" fails to reflect the Congressional concern of whether release after a given amount of incarceration would "jeopardize the public welfare." See O'Donnell, Churgin & Curtin, Toward a Just and Effective Sentencing System 29 n.30 (1977); cf. Rodriquez v. United States Parole Commission, ___ F.2d ___ (No. 78-2051, 7th Cir., March 20, 1979, slip op. 6) (expressing doubts about legality of board's policy of affording minimal weight to prison behavior but reserving issue).

Fifth, the guidelines treat all prisoners alike, whether they received regular adult sentences, and become eligible for parole after serving one-third of their sentence, or whether they received indeterminate sentences and become eligible for parole either upon imprisonment or at some time, set by the sentencing judge, prior to the one-third point.[102] While this result was intended in the Senate version of the PCRA, it was not incorporated in the PCRA as enacted, and it is plain that the board lacks the power to repeal a statute by administrative fiat.

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102 In its Return and Answer (App. 24), the board admitted the allegation of paragraph 27 of the complaint (App. 10) that a prisoner, like respondent, who was sentenced under then 18 U.S.C. §4208(a)(2) (1970) (reunumbered as 18 U.S.C. §4205(b)(2) in the PCRA) "will be considered as having the same 'customary total time before release' as a person receiving a regular adult sentence."

Petitioners' arguments in favor of the legality of the guidlines are supported by the same "surrealistic justifications" referred to in the House Judiciary Committee hearings. Before responding to these insubstantial arguments, we briefly discuss the constitutional problems which would be present if the present guidelines had been authorized by Congress in the PCRA.

### iv. Constitutional Problems with the Guidelines

That Congress did not authorize the type of guidelines used by the board is further shown by application of the "cardinal principle" that a statute will be construed in order to uphold its constitutionality. Lorillard v. Pons, 434 U.S. 575, 577 (1978). As we show below, substantial constitutional problems would arise if the PCRA is construed as authorizing the board's present use of its guidelines.

First, in contrast to the "equity judgment" of parole release before the Court in Greenholtz v. Inmates, ___ U.S. ___ (No. 78-201, May 29, 1979), the parole decision under the federal guidelines is a deferred sentencing decision. The board treats all prisoners as if they had received indeterminate sentences of the same length, and makes the overwhelming number of its parole release decisions by reference to the "customary ranges



of imprisonment" set out in its guidelines, even when the actual sentence is too short or too long to allow the prisoner to become eligible for parole within this "customary range," and without regard to the prisoner's performance while incarcerated. As the court of appeals concluded, such a delegation of the judicial function to an administrative agency would raise serious Article III questions. (Pet.Br. 49a-50a.)[103] See Palmore v. United States, 411 U.S. 389, 407-08 (1973). In addition, if the parole board is to be vested with sentencing powers, more process is due than is provided in the PCRA for the traditional "equity judgment" of parole, which synthesizes "record facts and personal observations filtered through the experience of the decisionmaker and lead[s] to a predictive judgment as to what is best for the individual inmate and for the community." Greenholtz v. Inmates, supra slip op. 6. See Mempa v. Rhay, 389 U.S. 128 (1967).

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103 This is in contrast to the lawful delegation of power in the making or release decisions based on factors determinable only after imposition of sentence. This distinction is overlooked in petitioners' attempt (Pet.Br. 74 n.65) to compare the board's resentencing decisions to the "equity judgments" made in a pure indeterminate sentencing system.

Second, as the court of appeals observed (Pet.App. 51a-53a), if the PCRA is construed as authorizing the offense severity ranking system of the guidelines the lack of standards in the Act for the board's ranking of the severity of offenses would raise substantial questions about the validity of such a delegation of power.[104] That Congress would have set standards for such a delegation of power is shown by the careful attention to this problem in the proposed revision of the federal criminal code, S. 1437. See S.Rep. 95-605, 95th Cong., 1st Sess., 1167-69 (1978).

Third, the guidelines operate to deny serious consideration for parole to those prisoners whose sentences are too short to allow them to serve the

104 For example, in 1976, the severity rating of immigration law violators was increased because of the "Commission's concern with the increasing number of immigration law violators in recent years." 41 Fed.Reg. 37316 (1976). While one commentator has suggested that such changes are "essential if a sentencing commission is to provide the kind of leadership necessary to make sentencing guidelines workable," Singer, In Favor of "Presumptive Sentences Set by a Sentencing Commission, 24 Crime & Delinquency 401, 417 n.20 (1978), the parole board is not a "sentencing commission," and we agree with the observation of the court of appeals (Pet.App. 52a n.114), that [s]uch a judgment appears to be one that is appropriate in the first instance for the Congress."



minimum "customary range of imprisonment" set for them by the guidelines. On this basis, it can fairly be said that prisoners with short sentences are deprived "of "of an interest in liberty on a wholesale basis" contrary to the due process clause of the Fifth Amendment. Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

These constitutional questions, of course, need not be resolved in this case because, as we have demonstrated above, the board's guidelines are not consistent with the type of guidelines contemplated in the PCRA. Petitioners' arguments to the contrary, which we discuss below, are without substance.

### v. Petitioners' Arguments Are Insubstantial

Petitioners' defense of the guidelines starts from the false premise that the criteria of 18 U.S.C. §4206(a) (1976) "form the basis for the guideline system." (Pet.Br. 61.) But as we have demonstrated in Part II(C) above, the basis for the present guidelines is a study of actual decisionmaking in YCA cases, and a number of invalid assumptions made thereafter in the creation of the offense severity scale and the salient factor scale.

From this mistaken premise, petitioners turn to an incorrect view of the legislative history of the PCRA. (Pet.Br. 63-70.) It is simply wrong to assert that "the Senate version of the guideline provision . . . was adopted in [the PCRA]." (Pet.Br. 64.) As we have shown above, both the House bill and the Senate bill would have required the board to act pursuant to some kind of guidelines -- the House bill required explicit guidelines for parole denials, the Senate bill adopted the existing guideline system, and neither version was adopted in the PCRA. Instead, as we have shown above, the guidelines required by the PCRA were to be consistent with the four concerns which have been present in federal parole law for the past 69 years -- institutional behavior, rehabilitation, the nature and circumstances of the particular offense, and the history and characteristics of the prospective parolee.



Nor is there any merit to petitioners' claim that the language in the Joint Explanatory Statement of the Conference Report (Pet.Br. 65-66) -- that the PCRA makes permanent the board's improvements -- was intended to ratify the board's existing guidelines. In 1973, the board conducted a pilot study of decentralization into various regions, which was separate from its cooperation with the National Council on Crime and Delinquency on improved decisionmaking processes.[105] Congress appropriated funds in June, 1974 to carry out the board's decentralization, see H.Rep. 94th Cong., 1st Sess., 2 (1975), and, as the court of appeals correctly held (Pet.App. 43a), these are the reforms which were made permanent in the PCRA, and which are referred to in the portion of the Conference report upon which petitioners rely.

Similarly, there is no basis for petitioners' reference (Pet.Br. 76-77) to the conference report as showing that the board was to make offense severity judgments "independent of the views of individual sentencing judges." On the contrary, the Conference Report at 26 recites that the board "is joined in purpose

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105 This is supported by the submission made by the chairman of the board in 1973 appropriation hearings. See Hearings on Dept. of Justice Appropriations for 1974 before a Subcomm. of the House Comm. on Appropriations, 93rd Cong., 1st Sess., 408 (1973).

with the Courts," and does not vest the board with the independence claimed by petitioners. Also, as we have shown above, the guidelines do not -- as petitioners assert (Pet.Br. 67) --consider "both the nature and circumstances of the offense and the history and characteristics of the prisoner."

Nor does the fact that in the PCRA Congress authorized the board "to moderate the disparities in the sentencing practices of individual judges," United States v. Addonizio, ___ U.S. ___ (No. 78-156, June 4, 1979, slip op. 10) (footnote omitted), mean that Congress intended the board to ignore the actual sentence imposed and resentence inmates. Such a radical change in the meaning of parole would require a clearer expression of Congressional intent than the recognition in the Conference Report that "parole has the practical effect of balancing differences in sentencing policies between judges and courts." Conference Report, supra at 19.

That Congress did not intend the board to be a resentencing agency is further shown by the fact that in 18 U.S.C. §4205(g) (1976) Congress delegated to the Bureau of Prisons -- not the board -- the power to apply to the sentencing judge for a reduction in the minimum sentence to make a prisoner immediately eligible for parole. Thus, the short answer to petitioners' argument that the board's guidelines are the only way in which the board may correct sentence disparity is simply that



Congress did not intend such a heavy emphasis upon resentencing in the parole release decision.

Finally, it is of no consequence that Congress made individual parole decisions immune from review under the Administrative Procedure Act. (Pet.Br. 69-70.)[106] This, of course, did not make the guidelines themselves immune from review, or allow the board to adopt whatever policies it chose, irrespective of those authorized by the PCRA. See TVA v. Hill, 437 U.S. 153, 194 (1978).

Petitioners' defense of the guidelines appears to assume that the only type of guidelines which could be adopted to comply with the PCRA are the "matrix guidelines" used before the PCRA was enacted. (Pet.Br. 62 n.56.) This, however, is plainly wrong, as shown by developments in those states which, in the course of

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106 Contrary to petitioners' arguments (Pet.Br. 13 n.7) all that was intended by Section 4218(d) was to exclude individual parole decisions from review under the APA, without interfering with a prisoner's habeas corpus remedy. As Representative Drinan stated, in explaining this provision of the PCRA, "It may be, for example, that a petition for writ of habeas corpus might lie for certain allegedly unlawful acts of the Commission even if they involve individual parole decisiins. But that is a matter left to the courts and this bill expresses no opinion, one way or the other in that regard." 122 Cong.Rec. 5164 (1976).

adopting parole guidelines, have rejected the "matrix model" in favor of a "sequential model." Those state parole boards concluded -- as the federal parole board should have concluded -- that they are not vested with the power "in effect, to resentence inmates." Gottfredson, Cosgrove, Wilkins, Wallerstein & Rauh, Classification for Parole Decision Policy 38 (1978).

We agree with petitioners (Pet.Br. 52 n.4.) that the proceedings on remand will be a formality -- we expect to have little difficulty in proving the facts discussed above, and thereby establishing that the present guidelines are contrary to the PCRA.



**vi. Ex Post Facto Problems**

The ex post facto issue is another constitutional question which need not be resolved in this case -- the question of whether the board's guidelines are of ex post facto effect as applied to persons sentenced for offenses committed prior to the effective date of the PCRA will be truly moot if, as we believe will result from this case, the board is required to adopt new guidelines. We will therefore treat the ex post facto issue in summary fashion.

1. Prior to the enactment of the PCRA, district judges would calculate the sentence to be imposed by relying upon the "historical assumption that the Board will give meaningful consideration to a defendant with a good institutional record at the expiration of one-third of his sentence,"[107] and many district judges would ordinarily impose sentence by relying "on the assumption that parole will be accorded at the one-third point."[108] Thus, in 1973, the Chairman of the Administrative

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107 Garcia v. United States Board of Parole, 409 F.Supp. 1230, 1239 (N.D.Ill. 1976), rev'd on other grounds, 557 F.2d 100 (7th Cir. 1977).

108 Newman, Preface to Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 812 (1975).

Conference of the United States advised Congress that judges impose sentences in the expectation "that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum term or anything approaching the maximum."[109] More recently, District Judge Lasker testified before the Senate Judiciary Committee that

> Many judges, I have to say, Mr. Chairman, habitually impose long or fairly long sentences in the expectation that a grant of parole will result in the actual time served being much less than originally imposed. Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 95th Cong., lst Sess., pt. 12, at 8969.

The identical view was expressed by former district judge and then chairman of the Advisory Corrections Council of the Judicial Conference, Harold Tyler:

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109 Hearings on H.R. 1590 and Identical Bills before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 93d Cong., lst Sess., 163-64, 193 (1973) (testimony and statement of Antonin Scalia, Chairman of the Administrative Conference of the United States).



> You know, and I know, as lawyers, that for years we have read in the papers that an offender, John Doe, has been sentenced to 15 years but we know he is not going to serve 15 years. He is going to serve perhaps 5 years.
>
> The public doesn't understand this. We lawyers perhaps do, but I'm not even sure we do all the time. Hearings on S. 1437, supra at 8960.

This understanding of the availability of parole to mitigate a harsh sentence was reflected in a survey of district judges[110] and was acknowledged by the Senate Judiciary Committee in its report accompanying S. 1437, the proposed revision of the federal criminal code:

> A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one third of the sentence. S.Rep. 95-605, 95th Cong., lst Sess., at 1169.

These expectations are borne out by an analysis of the board's pre-guideline release decisions for adult prisoners, which shows that the probability of parole was greatest when the prisoner had served between 31 to 50 percent of the total sentence imposed. Schmidt, Demystifying Parole 83 (1976).

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110 See Project, supra, note 108 at 882 n.361 (88% of judges responding to survey stated that they considered likelihood of parole in determining length of sentence to impose).

2. As the court of appeals concluded (Pet.App. 64a-65a), if the board's guidelines require that prisoners serve more time in prison before being paroled than formerly, the guidelines are of constitutionally impermissible ex post facto effect. Accord, Rodriquez v. United States Parole Commission, ___ F.2d ___ (No. 78-2051, 7th Cir., March 20, 1979, slip op. 8-10.) This is precisely what we expect the evidence to show. See Schmidt, supra at 50, concluding from her analysis of the board's pre-guideline statistics that application of the policies adopted in 1973 -- the guidelines -- will require that "individuals will serve more time [in prison before being paroled] than they have in the past."

Petitioners' arguments to the contrary are without merit. First, petitioners assert (Pet.Br. 78) that the guidelines do not "enhance the punishment imposed" because the board has always had the discretion to grant or to deny parole in individual cases as it sees fit. (Pet.Br. 78-84.) The question here, though, is whether the board may, consistent with the ex post facto prohibition, alter its policies to virtually eliminate the possibility of parole for prisoners who received what the board deems to be "lenient sentences," and require that other prisoners serve more time in prison before being paroled than they would have served under prior policies. This would plainly be the imposition of additional



punishment, especially when sentence was imposed with the expectation that the prisoner would be paroled before his (or her) mandatory release date, given good institutional behavior.

Second, petitioners assert (Pet.Br. 84-87) that the guidelines are not the "fairly tight framework to circumscribe the Board's statutorily broad power," Pickus v. United States Board of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974), intended in the PCRA. This, however, is a question of fact which, for the reasons discussed above, we expect will be easily resolved in our favor in the district court -- very few prisoners are granted parole before they have served the "customary range of imprisonment" set by the guidelines, and the board has structured its practices to apply the guidelines to resentence convicted felons upon their arrival at prison.

Third, petitioners contend (Pet.Br. 87) that the guidelines cannot be of ex post facto effect because no remedy is possible. This is absurd. If the guidelines are unlawful -- for whatever reason -- the proper remedy will be to require that new and lawful guidelines be promulgated. We presume that the board will thereafter establish some procedure to reconsider parole for those prisoners who were denied release under the unlawful criteria, but these are questions for another day.

As in the court of appeals (see Pet.App. 33a n.67), we have treated the ex post facto issue in summary fashion, not because of the lack of merit to the issue, but because of our belief that the present guidelines are contrary to the PCRA, making it unnecessary to reach the constitutional question. See New York City Transit Authority v. Beazer, ___ U.S. ___ (No. 77-1427, March 21, 1979, slip op. 13 n. 22.)

## CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals be affirmed.

July, 1979

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## APPENDIX

Reproduced from Petition for Writ of Certiorari, Cardillo v. United States Parole Commission, certiorari pending, No. 78-6620

# PAROLE TRANSCRIPT OF ONE THIRD HEARING

Time: February 3, 1978
Place: Allenwood, Penn.

[1] Mr. Cardillo, my name is Quirk and this is Mrs. Van Walrick on my left. We are examiners of the Parole Commission, here now to give you a review hearing, a one third review as a matter of fact. Since you've already had your initial hearing. Now basically our procedure is the same. We note that you have no representative that you have elected to proceed without it. We will talk to you for a little while, we will be discussing the case. What we hope to do Mr. Cardillo, is come up with a recommendation, that we come up with for the Commission. Now you know what I say recommendation. We do not make decisions at this level.

Cardillo: Right.

* * *

[5] Quirk: Your sentence only actually calls for 4 years.
Cardillo: The guidelines are supposed to be put me in a range where I can be eligible for parole.

Quirk: The guidelines are there to establish accountability.
Cardillo: Right, accountability according to crimes within the statutory time. I am over the statutory time by 36-48 months.

Quirk: But they are not extending the sentence.
Cardillo: No, no, no, you are not following my point. My guidelines are 36-48 according to you people.

Quirk: What this means, that people who have a Salient Factor score of 6 and an offense behavior of very high would normally be expected to do 36-48 months. That's exactly what it means.

Cardillo: I understand that. The guidelines were taken by taking the medium time of people who served time before. Now, they couldn't have gotten a time limit of 36-48 months, where the mean time could only be 40 months. My whole sentence even if I had gotten the whole sentence, even if I had gotten the full range, could only be 40 months. So they're over my range, I don't have any chance at all at Parole.

Quirk: Yes you do, they have to go below the guidelines. In other words, for accountability and that is what is facing Mrs. V and myself, to give you any kind of favorable decision we have to go below.

Cardillo: Way below, that's pretty hard. Statistics, you know, that's a very hard thing.

[6] Quirk: We have to justify it and the Commission has to justify going below. They also have to justify going above . . . which they can't go above in your case. Your time would be up before you reach the upper level. A matter of fact, your time would be up before you reach the lower level.

Cardillo: That's what I am saying.

Quirk: So, the same thing would apply if you got one year sentence.

Cardillo: I think they have made a mistake. I've researched it all. You don't really know what I am saying. My time could apply to a 15 or 10 year sentence. The most time I could get is 5 years.

Mrs. V: That's right.

Quirk: That's right.

Cardillo: That's the most I could have got by law. The most time I could do by law is 40 months, but the mean time is over that. Now could you come to that think if they took it from people who were in jail. They couldn't have served 40 months.

Quirk: I think you're equating that with sentencing. Which they don't do.

Cardillo: That's how they came to the guidelines. Sir, I don't want to argue with you.



Quirk: No they didn't not [sic] from sentencing.

Cardillo: Yes, but they got them from people who served my type of crime. You are not following me.

Mrs. V: I do but . . .

Quirk: But people with light sentences still have the same guidelines.

Cardillo: Alright, I am not going to argue it. I'll argue it in court. It's an illegal sentence.

Mrs. V: That's where it belongs.

Quirk: That at you point I think you have taken the right approach. Through the court, but the problem is now.

Cardillo: I don't want to get you people mad, that what I done the last time and you people said I wasn't interested in parole. I am more interested than anybody in parole.

Mrs. V: I am not mad.

Quirk: Now, here's the next question. Can you tell us why you think the Commission should go below guidelines. Assume you don't agree with them, but why do you think they should go below the guidelines and [7] release you at this time.

Cardillo: First of all I think that's pretty obvious. I have lots of problems, my wife has been under doctor's care for about 10 years now. It's hard for her, real hard for my young boys. They have no money, no extra money at all. Then again my father just recently about 2 or 3 months ago got another heart attack. They didn't even let me know about. He has been writing and praying I get out, I haven't seen him for 16 months, now there is no way to see him.

* * *

Quirk: Cardillo, Mrs. Van Warkin and I have been talking about it and reviewing the file and find no justification the we [sic] see it that your outside those guidelines for parole. The record would show, that you max out below the guidelines, and because we can find no reason, we recommend that you be

continued to expiration. Now, two things that's a recommendation, it may come back differently, secondly, it has no effect on what you do in court. We are going on the basis of guidelines as we have them now and sentence structure.

Cardillo: Let me ask you a question. What's stopping my parole: Is the time factor in the guidelines.

Quirk: What's stopping? Our recommendation is we don't see the case merits a recommendation below the guidelines, the time factor is what's stopping. What we are saying is basically in effect 33 months seems to be reasonable, on that sentence. OK?

Cardillo: Fine.

Quirk: Good luck to you.